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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1933

## No. 650

HARTFORD ACCIDENT & INDEMNITY COMPANY AND UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANTS,

*vs.*

DELTA & PINE LAND COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED DECEMBER 18, 1933.

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[fols. a–1] [Caption omitted]

[fol. 2]

## IN CIRCUIT COURT OF BOLIVAR COUNTY, FIRST JUDICIAL DISTRICT, OCTOBER TERM, 1931

No. 6550

DELTA AND PINE LAND CO. OF MISSISSIPPI, Plaintiff,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, Defendant

DECLARATION—Filed Sept. 17, 1931

Comes Delta & Pine Land Co. of Mississippi, a corporation duly incorporated under the laws of the State of Mississippi, and having its principal place of business in the Town of Scott, First Judicial District of Bolivar County, Mississippi, by Sillers & Roberts, its attorneys, and complains of the Hartford Accident and Indemnity Company, a Corporation duly incorporated under the laws of the State of Connecticut, and having its principal place of Business in the City of Hartford, Connecticut, and qualified and authorized to do business in the State of Mississippi by complying with the laws of the State of Mississippi in such cases made and provided, on a plea of trespass on the case on promises, and for cause of action shows:

That on or about the 1st day of January, 1928, the Delta & Pine Land Co. of Mississippi applied to the defendant, the Hartford Accident and Indemnity Company, for a fidelity bond in which bond, for valuable considerations, being agreed premiums as provided for in the bond hereinafter referred to, which said premiums were paid in cash by the plaintiff to the defendant, the said Hartford Accident and Indemnity Company executed and delivered to the said Plaintiff a fidelity bond with schedule attached as a part thereof under the terms and provisions of which the defendant promised and bound itself to pay to the said Plaintiff within sixty days after satisfactory proof thereof, [fol. 3] such pecuniary loss as the Delta & Pine Land Co.

of Mississippi shall have sustained of money or other personal property (including money or other personal property for which the Delta & Pine Land Co. of Mississippi was responsible) through the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or wilful misapplication committed directly or in connivance with others by any of the employees named upon the schedule attached to the said bond, in any position, anywhere, during the period commencing with the respective dates set opposite the names of the employees in such schedule, and ending with the termination of the suretyship for any employee by his dismissal or retirement from the service of the Delta & Pine Lands Co. of Mississippi, by the discovery of loss under said bond or by cancellation by the Delta & Pine Land Co. of Mississippi or the Hartford Accident and Indemnity Company, a copy of which said bond and schedule are attached hereto as Exhibit "A" and made a part hereof.

That on or about the 24th day of February, 1928, upon the application of the plaintiff and in consideration of the premiums paid by the plaintiff to the defendant therefor, the said defendant executed and delivered unto the plaintiff a rider which was and is attached to said bond as a part thereof, under the terms of which the said bond was extended to cover the liabilities imposed under former bonds described therein, a copy of which rider is filed herewith as Exhibit "B" hereto and made a part hereof.

That on or about the 1st day of January, 1929, upon application of the plaintiff and in consideration of the agreed premiums paid by the plaintiff to the defendant as provided for in said bond Exhibit "A", the said defendant, under the terms and provisions of said bond Exhibit "A" executed and delivered unto said plaintiff an additional schedule listing names and employees, dates and amounts [fol. 4] of liability covering each, which was and is now attached to said bond as a part thereof, a copy of which said schedule is filed herewith as Exhibit "C" hereto and made a part hereof.

That on or about the 1st day of January, 1929, upon application of the plaintiff and in consideration of the agreed premiums paid by the plaintiff to the defendant as provided for in said bond Exhibit "A", the said defendant, under the terms and provisions of said bond Exhibit "A"

executed and delivered unto said plaintiff an additional schedule listing names and employees, dates and amount of liability covering each, which was and is now attached to said bond as a part thereof, a copy of which said schedule is filed herewith as Exhibit "D" hereto and made a part hereof.

That on or about the 4th day of June, 1929, upon application of the plaintiff and in consideration of the agreed premiums paid by the plaintiff to the defendant as provided for in said bond Exhibit "A", the said defendant, under the terms and provisions of said bond Exhibit "A" executed and delivered unto said plaintiff an additional schedule listing names and employees, dates and amount of liability covering each, which was and is now attached to said bond as a part thereof, a copy of which said schedule is filed herewith as Exhibit "E" hereto and made a part hereof.

Plaintiff alleges that H. H. Harris who was employed as Treasurer of the defendant company was one of the employees named on the schedules attached to said bond and on the schedule Exhibit "C" attached hereto; that the amount set opposite the name of H. H. Harris was Twenty-Five Thousand ($25,000.00) Dollars, and the date set opposite the name of the said H. H. Harris was January 1st, 1928, and January 1st, 1929, as shown by said Exhibits [fol. 5] "A" and "C", and that, therefore, the liability of the Hartford Accident and Indemnity Company on account of defalcations of H. H. Harris covered all amounts of defalcations as aforesaid to the extent of $25,000.00.

Plaintiff alleges that said bond was in full force and effect beginning on the 1st day of January, 1928, up to and including the 1st day of January, 1930, and at all times when the defalcations herein complained of were made, occurred and took place.

Plaintiff alleges that it sustained pecuniary loss of money through the fraud, dishonesty, theft, embezzlement, wrongful abstraction and/or wilful misapplication by the said H. H. Harris of the funds of the said plaintiff on account of the following transactions;

On May 9th, 1929, the said H. H. Harris drew a check in the amount of $40.00 on the First National Bank, Memphis, Tennessee, which check was payable to Delta & Pine Land Co. and which check he delivered to the plaintiff with

the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $40.00 lawful money of the United States of the value of $40.00.

On June 4th, 1929, the said H. H. Harris drew a check in the amount of $141.89 on the First National Bank, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $141.89 lawful money of the United States of the value of $141.89.

[fol. 6] On June 8th, 1929, the said H. H. Harris drew a check in the amount of $25.00 on the First National Bank, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $25.00 lawful money of the United States of the value of $25.00.

On July 3rd, 1929, the said H. H. Harris drew a check in the amount of $161.26 on the First National Bank, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from plaintiff the sum of $161.26 lawful money of the United States of the value of $161.26.

On July 10th, 1929, the said H. H. Harris drew a check in the amount of $35.05 on the First National Bank, Memphis, Tennessee, which check was payable to S. L. Davenport, and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said

Harris did then and there obtain from the plaintiff the sum of $35.05 lawful money of the United States of the value of $35.05.

On July 12th, 1929, the said H. H. Harris drew a check in the amount of $100.00 on the First National Bank, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plain-
[fol. 7] tiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $100.00 lawful money of the United States of the value of $100.00.

On July 18th, 1929, the said H. H. Harris drew a check in the amount of $12.96 on the Commercial Bank, Greenville, Mississippi, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $12.96 lawful money of the United States of the value of $12.96.

On July 26th, 1929, the said H. H. Harris drew a check in the amount of $50.00 on the First National Bank, Memphis, Tennessee, which check was payable to Delta & Pine Land Co. and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the Bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $50.00 lawful money of the United States of the value of $50.00.

On August 7th, 1929, the said H. H. Harris drew a check in the amount of $18.74 on the First National Bank, Memphis, Tennessee, which check was payable to S. L. Deavenport, and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the
[fol. 8] sum of $18.74 lawful money of the United States of the value of $18.74.

On August 8th, 1929, the said H. H. Harris drew a check in the amount of $75.00 on the First National Bank, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $75.00 lawful money of the United States of value of *$147.84.*

On August 8th, 1929, the said H. H. Harris drew a check in the amount of $147.84 on the First National Bank, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $147.84 lawful money of the United States of the value of $147.84.

On August 14th, 1929, the said H. H. Harris drew a check in the amount of $104.16 on the First National Bank, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $104.16 lawful money of the United States of the value of $104.16.

[fol. 9] On September 12th, 1929, the said H. H. Harris drew a check in the amount of $333.66 on the First National Bank, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $333.66 lawful money of the United States of the value of $333.66.

On September 16th, 1929, the said H. H. Harris drew a check in the amount of $100.00 on the First National Bank, Memphis, Tennessee, which check was payable to Delta &

Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff and the said Harris did then and there obtain from the plaintiff the sum of $100.00 lawful money of the United States of value of $100.00.

On October 5th, 1929, the said H. H. Harris drew a check in the amount of $100.00 on the First National Bank, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $100.00 lawful money of the United States of the value of $100.00.

On October 7th, 1929, the said H. H. Harris drew a check in the amount of $236.69 on the First National Bank, Memphis, Tennessee, which check was made payable to [fol. 10] Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, the said Harris did then and there obtain from the plaintiff the sum of $236.69 lawful money of the United States of the value of $236.69.

On October 19th, 1929, the said H. H. Harris drew a check in the amount of $20.00 on the Bank of Commerce, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $20.00 lawful money of the United States of the value of $20.00.

On November 6th, 1929, the said H. H. Harris drew a check in the amount of $30.00 on the Bank of Commerce, Memphis, Tennessee, which check was payable to S. L. Deavenport, and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and

which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $30.00 lawful money of the United States of the value of $30.00.

On November 14th, 1929, the said H. H. Harris drew a check in the amount of $290.18 on the Bank of Commerce, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the [fol. 11] said Harris did then and there obtain from the plaintiff the sum of $290.18 lawful money of the United States of the value of $290.18.

On December 12th, 1929, the said H. H. Harris drew a check in the amount of $40.00 on the Bank of Commerce, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and said Harris did then and there obtain from the plaintiff the sum of $40.00 lawful money of the United States of the value of $40.00.

On December 12th, 1929, the said H. H. Harris drew a check in the amount of $280.67 on the Bank of Commerce, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $280.67 lawful money of the United States of the value of $280.67.

On December 20th, 1929, the said H. H. Harris drew a check in the amount of $100.00 on the Bank of Commerce, Memphis, Tennessee, which check was payable to Delta & Pine Land Co., and which check he delivered to the plaintiff with the representation that the same would be paid upon presentation to the bank upon which it was drawn and which said check was cashed by the plaintiff, and the said Harris did then and there obtain from the plaintiff the sum of $100.00 lawful money of the United States of the value of $100.00.

[fol. 12] Plaintiff alleges that the said H. H. Harris was Treasurer of the said Delta & Pine Land Co. of Mississippi and as such was entrusted with the duty of presenting and collecting the said checks for the use and benefit of the said plaintiff, and when said checks were sent to him by the Cashier he destroyed said checks and did not forward them to the Bank on which they were drawn for collection, but appropriated all of the said funds to his own use and thereby defrauded the said plaintiff of said respective amounts totaling in the aggregate the sum of $2,443.10, all of which was in violation of the duties and responsibilities entrusted to and required of him by his aforesaid employment with the plaintiff, and all of which wese covered by and under the provisions of the aforesaid Fidelity Bond executed by the defendant and delivered to the plaintiff, and by reason of which the said defendant became liable to and promised to pay to the plaintiff the said sums and/or sum of which it was so defrauded by its said employee, the said Harris.

Plaintiff alleges that on September 5th, 1929, the said H. H. Harris fictitiously entered as a receipt in the cash book of the said plaintiff a check dated September 5th, 1929, and in the amount of $260.69, and credited his personal account with said sum of money in the accounts payable ledger; that the said plaintiff did not receive said check but that said entries made by the said H. H. Harris were false entries, and by reason of which and as a result thereof the said Harris fraudulently obtained of and from the said plaintiff the sum of $260.69 of lawful money of the United States of the value of $260.69, all of which he appropriated to his own use thus defrauding the said plaintiff of said sum of money resulting in a loss to it, the said plaintiff, of the said sum of $260.69, and by reason whereof under [fol. 13] the terms and provisions of said fidelity bond, Exhibit "A", and schedules attached thereto aforementioned, said defendant became liable to and promised to pay to the plaintiff the said sum of $260.69.

Plaintiff alleges that all of the aforesaid defalcations, frauds, etc., and the loss resulting to plaintiff therefrom occurred in the First Judicial District of Bolivar County, Mississippi, and that by reason of the aforementioned acts as aforesaid the said plaintiff has sustained pecuniary loss in the sum of $2,703.79.

Plaintiff alleges that beginning on the 1st day of January, 1929, and on the date of each and every one of the aforesaid defalcations hereinabove complained of, and at all times since, the said defendant Hartford Accident and Indemnity Company was, and is now, duly qualified and licensed to do, and was and is now doing business including indemnifying insurance business as covered by the fidelity bond Exhibit "A" and schedules attached, in the First Judicial District of Bolivar County, Mississippi, having complied with the laws of the State of Mississippi in such cases made and provided.

Plaintiff alleges that the dishonest acts of the said H. H. Harris above complained of were discovered by it on or about the 20th day of May, 1931; that immediately upon the discovery of said dishonest acts of the said Harris the plaintiff gave written notice thereof to the Hartford Accident and Indemnity Company at its home office; that affirmative proof of loss under oath, together with full particulars of such loss, were filed with the said defendant at its Home Office within three (3) Months after such discovery, a copy of said affirmative proof of loss being attached hereto as Exhibit "F" and made a part hereof, and that this suit is [fol. 14] brought and filed before the expiration of twelve (12) months after the filing of said proof of loss.

Plaintiff alleges that it has at all times kept, conformed and complied with all of the terms, provisions and conditions of the said bond Exhibit "A" and schedules thereto attached, upon its part to be by it kept and performed.

Plaintiff alleges that notwithstanding such performance by it and notwithstanding the fact that under the terms and provisions of the said bond Exhibit "A" and schedules thereto attached, the defendant became liable to and promised to pay to it, the said plaintiff, the aforesaid sums of money resulting in the total loss to it of $2,703.79, and although the time for payment of said sum of money in and by said bond promised by said defendant to be paid to the said plaintiff has long since lapsed and the said sum is now due and payable to the plaintiff under and by the terms and provisions of said bond, and notwithstanding the fact that said bond was in full force and effect at the time of the defalcations as hereinabove alleged and is now in full force and effect, the said defendant although often requested has not paid said sum or any part thereof to the plaintiff, but

has wholly neglected and refuses so to do to the damage of the plaintiff in the sum of $2,703.79, with lawful interest.

Wherefore, Plaintiff brings this suit and demands of and from the said defendant, Hartford Accident and Indemnity Company, the sum of $2,703.79 with lawful interest and all costs of this suit.

Sillers & Roberts, Attorneys for Plaintiff.

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[fol. 15] EXHIBIT "A" TO DECLARATION

Fidelity Department

Schedule Bond B. No. 103

Hartford Accident and Indemnity Company, Hartford, Connecticut

The Hartford Accident and Indemnity Company (hereinafter called the Surety), in consideration of an agreed premium, binds itself to pay to Delta & Pine Land Co., of Mississippi, and/or Delta Farm Co., and/or Empire Plantation Co. (as their interest may appear) (hereinafter called the Employer), within sixty (60) days after satisfactory proof thereof, such pecuniary loss as the Employer shall have sustained of money or other personal property (including money of other personal property for which the Employer is responsible) through the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction of wilful misapplication committed directly or in connivance with others by any of the employees named upon the schedule attached hereto and made a part hereof, in any position, anywhere, during the period commencing with the respective dates set opposite the names of the employees in such schedule, and ending with the termination of the suretyship for any employee by his dismissal or retirement from the service of the Employer, by the discovery of loss hereunder, or by cancellation by the Employer or the Surety.

The liability of the Surety on account of any one employee shall not exceed the amount set opposite the employee's name in said schedule. The employer may, during the continuance of this bond, add other employees to said schedule or increase or decrease the amount of suretyship for any employee, by giving written notice to the

[fol. 16] Surety, but such notice shall not be binding on the Surety until the Employer has received the Surety's written acceptance thereof. In the event of such increase or decrease the Surety's liability as respects such employee shall not exceed the scheduled amount in effect as to such employee when the dishonest act of the employee shall have been committed. The Surety's liability shall in no event exceed the maximum amount at any time in effect in said schedule as to such employee.

Upon the discovery by the Employer of any dishonest act on the part of any employee the Employer shall give immediate written notice thereof to the Surety at its Home Office. Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the Surety at its Home Office within three (3) months after such discovery.

Any claim hereunder must be duly made upon the Surety within fifteen (15) months after the termination of the Suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the Employer against the Surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing the construction hereof, then within the shortest period of limitation permitted by such law.

The Suretyship for any or all employees may be canceled:

(a) By the Surety, by giving thirty days notice of cancellation to the Employer in writing of its desire so to cancel;

(b) By the Employer, by giving notice to the Surety in writing of the Employer's desire so to cancel.

In the event of such cancellation and no claim having been made hereunder, the surety shall refund the unearned premium if any.

[fol. 17] In witness whereof, the Hartford Accident and Indemnity Company has caused this bond to be signed by its duly authorized officers and its corporate seal to be hereunto affixed this 1st day of January, 1928.

Hartford Accident and Indemnity Company, M. F. Dobonia, Attorney-in-fact.

Attest: D. C. Croom.

[fol. 18]

SCHEDULE OF EMPLOYEES

| No | Date | Name | Position | Location | Amount | Premium |
|---|---|---|---|---|---|---|
| | 1/28 | Johnson, Oscar | President | Memphis, Tenn. | $25,000.00 | $75.00 |
| | " | Lynes, Roberts | Vice-pres. | " | 25,000.00 | 75.00 |
| | " | Harris, H. H. | Treas. | " | 25,000.00 | 75.00 |
| | " | Toler, A. F. | Sect. | " | 25,000.00 | 75.00 |
| | " | Gallaugher, R. J. | Asst. Treas. | " | 10,000.00 | 30.00 |
| | " | Stout, W. F. | Bookkeeper | " | 10,000.00 | 30.00 |
| | " | Sanders, J. G., Jr. | Clerk | " | 2,000.00 | 6.00 |
| | " | Dye, C. T. | Purchasing Agent | " | 2,000.00 | 6.00 |
| | " | Davenport, S. L. | Office Mgr. | Scott, Miss. | 10,000.00 | 30.00 |
| | " | Miller, W. L. | Cashier | " | 10,000.00 | 30.00 |
| | " | Hendricks, J. F. | Bookkeeper | " | 2,000.00 | 6.00 |
| | " | Hale, J. D. | Store Mgr. | " | 5,000.00 | 15.00 |
| | " | Rippie, Cloise | Asst. Bookkeeper | " | 2,000.00 | 6.00 |
| | " | Hatcher, J. L. | Clerk | " | 1,000.00 | 3.00 |
| | " | Chancellor, E. M. | Clerk | " | 1,000.00 | 3.00 |
| | " | Comegrys, John | Clerk | " | 1,000.00 | 3.00 |
| | " | Sandidge, R. S. | Store Mgr. | Lamont, Miss. | 3,000.00 | 9.00 |
| | " | Warren, Hugh | Store Mgr., Kutaw | Scott, " | 2,000.00 | 6.00 |
| | " | Brenner, Chas., Jr. | Drug store Mgr. | " " | 1,000.00 | 3.00 |
| | " | Love, R. C. | Office Mgr. | Deeson, Miss. | 15,000.00 | 45.00 |
| | " | Caldwell, A. P. | Asst. " | " | 2,000.00 | 6.00 |
| | " | Daws, J. T. | Store " | " | 3,000.00 | 9.00 |
| | " | McGaha, J. J. | " Clerk | " | 1,000.00 | 3.00 |
| | " | Scott, W. B. | " " | " | 1,000.00 | 3.00 |
| | " | Moss, A. N. | Bkkpr-Cashier | Estill, Miss. | 5,000.00 | 15.00 |
| | " | Stafford, V. J. | Store Mgr. | " | 4,000.00 | 12.00 |
| | " | Lowe, Earl | " Clerk | " | 1,000.00 | 3.00 |
| | " | McNeill, T. H. | Plantation Mgr. | " | 10,000.00 | 30.00 |
| | " | Moore, Dave | " " | Lake Cormant, Miss. | 5,000.00 | 15.00 |

[fol. 19] EXHIBIT "B" TO DECLARATION

Hartford Accident & Indemnity Company,
Hartford, Connecticut

Executed in Duplicate

Rider

To be attached to and form a part of Schedule Fidelity Bond ~~No. 709540,~~ of the Hartford Accident and Indemnity Company (hereinafter called the Surety), covering certain employees of the Delta & Pine Land Co. of Miss. &/or Delta Farms Co., &/or Empire Plantation Company, Memphis, Tenn., as their interests may appear (hereinafter referred to as the new bond).

Whereas the said new bond, has upon its issuance, displaced and cancelled various schedule bonds listed below, executed also by the Hartford Accident & Indemnity Company (hereinafter referred to as the old bonds).

| Bond No. | Effective date | Name | Amount of bond |
|---|---|---|---|
| 285575 | Feb. 24, 1922 | Delta & Pine Land Co. of Mississippi | $53,500.00 |
| 345264 | Dec. 1, 1922 | Empire Plantation Company | $20,000.00 |

Whereas, the old bonds, as of the effective date of the new bond, have been cancelled, or have been terminated by agreement, as is evidenced by the issuance and acceptance of the new bond and this rider.

Now, therefore, it is hereby understood and agreed as follows:

[fol. 20] First. That the new bond shall be construed to cover, subject to its terms, conditions and limitation, any loss under said old bonds caused by any employee covered by the latter, which shall be discovered after the expiration of the period allowed under the old bonds in which claim may be presented after cancellation or termination, and before the expiration of the time limited in the new bond for the discovery of loss or making claim hereunder, and which would have been recoverable under said old bonds had they continued in force, and also under the new bond had such occurred during the currency thereof.

Second. That nothing herein contained shall be construed to render the Surety liable under the new bond for a larger amount on account of such loss or losses under said old bonds that would have been recoverable thereunder had they continued in force, or to increase the time for discovering loss under said old bonds beyond what would have been the time had they continued in force.

Third. That the liability of the surety for a loss under both the old and the new bonds, as to that part of the loss under the old bonds shall not exceed the amount to which it is limited in the second clause of this rider, and as to that part of the loss under the new bond shall not exceed the amount applicable to the employee causing the loss under the new bond, and to the whole loss shall not exceed the amount applicable to the employee causing the loss under either the old bonds or the new bond, whichever may be the larger.

Signed, sealed and dated the 24th day of February, 1928.
Hartford Accident and Indemnity Company, by Ray H. Dexter, Attorney. (Seal.)

Attest: A. C. Strum, Attorney.

[fol. 21] The above is hereby agreed to and accepted.
Delta & Pine Land Co. of Mississippi &/or Delta Farms Co. &/or Empire Plantation Co., by Robert Lynes, Vice-President.

[fol. 22]

EXHIBIT "C" TO DECLARATION

Schedule Bond #709540

Employees of Delta & Pine Land Co., of Mississippi, and/or Delta Farms Co., and/or Empire Plantation Co.

| Number | Date | Name | Position | Location | Amount |
|---|---|---|---|---|---|
| 709540 | 1-1-29 | Johnston, Oscar | President | Memphis, Tenn. | $25,000 |
| " | " | Lynes, Robert | Vice-Pres. | " | 25,000 |
| " | " | Harris, H. H. | Treasurer | " | 25,000 |
| " | " | Toler, A. F. | Secretary | " | 25,000 |
| " | " | Gallaugher, R. J. | Asst. Treas. | " | 10,000 |
| " | " | Stout, W. F. | Bookkeeper | " | 10,000 |
| " | " | Sanders, J. G., Jr. | Clerk | " | 2,000 |
| " | " | Dye, C. T. | Purchasing Agent | " | 2,000 |
| " | " | Ready, L. R. | Store Clerk | Scott, Miss. | 1,000 |
| " | " | Deavenport, S. L. | Office Mgr. | " | 10,000 |
| " | " | Miller, W. L. | Cashier | " | 10,000 |
| " | " | Hedricks, J. F. | Bookkeeper | " | 2,000 |
| " | " | Rippee, Cloise | Asst. Bookkeeper | " | 2,000 |
| " | " | Hale, J. D. | Store Mgr. | " | 5,000 |
| " | " | Hatcher, J. L. | Clerk | " | 1,000 |
| " | " | Chancellor, E. M. | Clerk | " | 1,000 |
| " | " | Comegrys, John | Clerk | " | 1,000 |
| " | " | Sandidge, R. S. | Store Mgr. | Lamont, Miss. | 3,000 |
| " | " | Warren, Hugh | Store Mgr., Eutaw | Scott, Miss. | 2,000 |
| " | " | Brenner, Chas., Jr. | Drug Store Mgr. | " | 1,000 |
| " | " | Conn, E. J. | Office Clerk | " | 2,000 |
| " | " | Love, R. C. | Office Mgr. | Deeson, Miss. | 15,000 |
| " | " | Dawes, J. T. | Store Mgr. | " | 3,000 |
| " | " | McGaha, J. J. | " Clerk | " | 1,000 |
| " | " | Conner, R. H. | Store " | " | 1,000 |
| [fol. 23] | | | | | |
| " | " | Moss, A. N. | Bkkpr-Cashier | Estill, Miss. | 5,000 |
| " | " | Stafford, V. J. | Store Mgr. | " | 4,000 |
| " | " | Lowe, Earl | " Clerk | " | 1,000 |
| " | " | McNeill, T. H. | Plantation Mgr. | " | 10,000 |
| | | | | Total penalty | $205,000 |
| | | | | Total premium | 615 |

A line is drawn through the following names: Lyles, Robert; Gallaugher, R. J.; Sanders, J. G., Jr.; Dye, C. T.; Ready, L. R.; Chancellor, E. M.; McGaha, J. J.

[fol. 24] EXHIBIT "D" TO DECLARATION

Acceptance of Change in Schedule of Employees Attached to Schedule Bond No. 709540

Acceptance of Notice No. 1

Dated at Memphis this 1st day of Jan. 1929.

Delta & Pine Land Co., of Mississippi,
Memphis, Tenn.

GENTLEMEN: We acknowledge receipt of your favor of January 1st, 1929, asking that the following changes be made in the Schedule of Employees attached to our Schedule Bond No. 709540, in your favor, expiring Jan. 1st, 1930 Subject to the terms and conditions of said bond, the changes have been made on the records of this company as hereafter set out.

Additions

| Effective | Bond | Name | Position | Location | Amt. | Premium debit |
|---|---|---|---|---|---|---|
| 5-1-28 | 709540 | E. J. Conn | Office Clerk | Scott, Miss. | $2,000 | $4.00 |
| " | " | L. R. Ready | Store Clerk | " | 1,000 | 2.00 |
| " | " | R. H. Conner | " " | Deeson, " | 1,000 | nil |

Deductions

| Date terminated | | | | | Premium credit |
|---|---|---|---|---|---|
| 9-1-28 | 709540 | A. P. Caldwell | Deeson, Miss. | $2,000 | $2.00 |
| 12-28-28 | " | W. B. Scott (died) | " " | 1,000 | nil |
| 1-1-29 | " | Dave Moore | Lake Cormant, Miss. | 5,000 | nil |

This acceptance notice is issued with the distinct understanding that the liability of the Hartford Accident and [fol. 25] Indemnity Company shall under no circumstances be cumulative, and shall not exceed the amount of bond in effect as to any employee or employees when the dishonest act of the employee or employees shall have been committed and shall in no event exceed the maximum amount at any time specified as to such employee or employees.

Hartford Accident and Indemnity Company, by
M. F. Dobbins, Attorney-in-Fact. (Seal.)

[fols. 26–31] EXHIBIT "E" TO DECLARATION

Acceptance of Change in Schedule of Employees Attached to Schedule Bond No. 709540

Acceptance of Notice No. 3

Dated at Memphis this 4 day of June 1929.

Delta & Pine Land Co.,
Memphis, Tenn.

GENTLEMEN: We acknowledge receipt of your favor of June 4th, 1929 asking that the following changes be made in the Schedule of Employees attached to our Schedule Bond No. 709540, in your favor, expiring Jan. 1st, 1930 Subject to the terms and conditions of said bond, the changes have been made on the records of this company as hereafter set out.

Additions

| Effective date | Bond | Name | Position | Location | Amount | Pre. deb. |
|---|---|---|---|---|---|---|
| 6-5-29 | 347756 | W. B. Ware | Manager | Benoit, Miss | $1,000 | $1.70 |
| 2 | " | S. J. Ely | " | " " | 1,000 | 1.00 |

This acceptance notice is issued with the distinct understanding that the liability of the Hartford Accident and Indemnity Company shall under no circumstances be cumulative, and shall not exceed the amount of bond in effect as to any employee or employees when the dishonest act of the employee or employees shall have been committed, and shall in no event exceed the maximum amount at any time specified as to such employee or employees.

Hartford Accident and Indemnity Company, by
M. F. Dobbins, Attorney-in-Fact. (Seal.)

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[fol. 32] IN CIRCUIT COURT FIRST JUDICIAL DISTRICT OF BOLIVAR COUNTY, MISSISSIPPI

[Title omitted]

PLEA—Filed Oct. 19, 1931

Now comes Hartford Accident & Indemnity Company and for plea says that plaintiff should not have its action be-

cause plaintiff before and at the date of the contract of suretyship herein sued upon was doing business in the State of Tennessee and had its principal office at Memphis, in said State, and defendant was also then, as it is now, doing business in the State of Tennessee and had an Agency at Memphis, in said State, and plaintiff through its said office at Memphis, in said State, applied to defendant through its said Agency at Memphis, in said State, for said bond, rider and schedules containing the name of the defaulting employee, H. H. Harris, constituting said contract of suretyship, and defendant through its said Agency at Memphis, executed and delivered the same to plaintiff at its said office at Memphis, in said State, and said contract is a Tennessee contract and is governed by the laws of Tennessee and full faith and credit must be given thereto in the courts of this State under and in accordance with the requirements of article 4, Section 1; Article 1, Section 10 and Section 1 of the Fourteenth Amendment of the Constitution of the United States, and there was not then [fol. 53] and there is not now any statute in the State of Tennessee that prohibits and renders invalid the condition or limitation in said contract hereinafter mentioned, and the highest court of the State of Tennessee, to-wit, the Supreme Court, has held and announced as the law in Tennessee in a number of its decisions, to-wit, Guthrie v. Indemnity Association, 101 Tenn. 643; Phoenis Cotton Oil Co. v. Royal Indemnity Co., 140 Tenn. 438, City of Bristol v. Bostwick, 146 Tenn. 205, and other cases, that such conditions or limitations in such contracts are valid and binding; and said contracts of suretyship herein sued upon provided that any claim thereunder must be duly made upon the defendant, the surety, within fifteen (15) months after the termination of the suretyship for the defaulting employee, and plaintiff did not make claim for its loss upon defendant, the surety, within fifteen (15) months after the termination of its suretyship for said defaulting employee, Harris, in that said contract of suretyship was canceled and thereby terminated December 31, 1929, and plaintiff did not make claim upon defendant until June 22, 1931; and this defendant is ready to verify.

Wm. M. & Wm. G. Hall, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 34] IN CIRCUIT COURT FIRST JUDICIAL DISTRICT OF BOLIVAR COUNTY, MISSISSIPPI

[Title omitted]

DEMURRER—Filed Aug. 3, 1932

Now comes the plaintiff, and as to the plea of the defendant by it above pleaded, says that the same and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to bar it, the plaintiff, from having its aforesaid action, and that it is not bound by law to answer the same, and for cause of demurrer the plaintiff shows to the Court:

1. The construction and validity of the provision in the contract requiring that any claim thereunder must be duly made upon the defendant, the surety, within fifteen (15) months after the termination of the suretyship for the defaulting employee is not determined by the laws of the State of Tennessee but is determined by the laws of the State of Mississippi.

2. The Statute of Limitations of the State where the suit is brought is the Statute of Limitations which governs the time within which actions must be brought, and the provision in the contract requiring that any claim thereunder must be duly made upon the defendant, the surety, within fifteen (15) months after the termination of the suretyship for the defaulting employee is in violation of Section [fol. 35] 2294 of the Mississippi code of 1930 (Section 2491 of Hemingway's 1917, Code of Mississippi), and in violation of the public policy of the State of Mississippi, and the Courts of this State are not required to give full faith and credit to said provision under and in accordance with the requirements of Article 4, Section 1; Article 1, Section 10 and Section 1 of the Fourteenth Amendment of the Constitution of the United States as contended in defendant's said plea.

Wherefore, for want of sufficient plea in this behalf, the plaintiff prays judgment and its damages, etc., to be adjudged to it, etc.

Sillers & Roberts, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 36] IN CIRCUIT COURT OF BOLIVAR COUNTY

No. 6500

DELTA & PINE LAND COMPANY OF MISSISSIPPI

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY

JUDGMENT—Oct. 18, 1932

This cause coming on this day to be heard upon the declaration, plea, and plaintiff's demurrer to the plea, and the Court having heard argument of counsel and being sufficiently advised, doth order and adjudge that the said demurrer be, and the same is, hereby sustained, and the defendant declining to plead further, it is therefore ordered by the Court that judgment by default be, and the same is, hereby rendered in favor of the plaintiff, Delta & Pine Land Company of Mississippi, a Mississippi Corporation, against the defendant, Hartford Accident & Indemnity Company, a Connecticut Corporation, and a writ of inquiry having been called for, the same was issued by the Court and properly served and returned in the manner as provided by law, and in response thereto there came into Court a jury of good and lawful men composed of J. A. Wherry and eleven others, who being duly qualified, impaneled and sworn to diligently inquire into what damages the said plaintiff has sustained, and to well and truly try and determine all matters presented between the plaintiff and the defendant, and the jury having heard the evidence offered in open Court and argument of counsel, and having received the instructions from the Court, retired to consider their verdict and returned into open Court the following verdict:

"We, the Jury find for the plaintiff in the sum of $2,703.79, with interest from August 27, 1931 at the rate of 6% per annum to date of payment."

[fols. 37-45] Whereupon, it is therefore considered by the Court and so ordered and adjudged that the plaintiff, Delta & Pine Land Co., of Mississippi, do have of and recover from the defendant, Hartford Accident & Indemnity Company, the sum of $2,703.79, with 6% interest thereon from

the 27th day of August, A. D. 1931 to date of payment, together with all costs in this behalf incurred, for all of which let execution issue.

To all of which action of the Court the defendant excepted, and upon application duly made an appeal is hereby granted, to the defendant upon its entering into bond as required by law.

Ordered and adjudged on this, the 18th day of October, A. D. 1932.

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[fol. 46] IN SUPREME COURT OF MISSISSIPPI

No. 6500

HARTFORD ACCIDENT & INDEMNITY COMPANY, Appellant,

versus

DELTA & PINE LAND COMPANY, Appellee

ASSIGNMENT OF ERRORS—Filed Jan. 30, 1933

Now comes Hartford Accident & Indemnity Company and assigns the following error in the action of the Circuit Court in this case, to-wit:

The Court erred in sustaining the Demurrer of the Delta & Pine Land Company to its Plea and rendering judgment against it, because the provision of the bond requiring claim thereunder to be made within fifteen (15) months after termination of the contract of suretyship, which the Delta & Pine Land Company did not comply with, was valid under the law of Tennessee; and the law of Tennessee, and not the law of Mississippi, governed and the Courts of Mississippi had to give full faith and credit thereto, and could not apply its statute (2294, Code 1930) in view of Article 4, Section 1; Article 1, Section 10; and Section 1 of the 14th Amendment, of the Constitution of the United States.

Wherefore it prays that said judgment be reversed and proper judgment entered here.

(Signed) Wm. M. & Wm. G. Hall, Counsel for Hartford Accident & Indemnity Company.

[fol. 47] I, Wm. M. Hall, one of counsel for Hartford Accident & Indemnity Company, hereby certify that I have

this day mailed, postage prepaid, to counsel for Delta & Pine Land Company, Sillers & Roberts, at Rosedale, Mississippi, a true copy of the foregoing Assignment of Errors.

Memphis, Tennessee, this the 28 day of January, A. D. 1933.

(Signed) Wm. M. Hall, of Counsel for Hartford Accident & Indemnity Company.

[File endorsement omitted.]

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[fol. 48] IN SUPREME COURT OF MISSISSIPPI

Division A: McGowen, J.

No. 30,445

HARTFORD ACCIDENT & INDEMNITY COMPANY

vs.

DELTA & PINE LAND COMPANY

OPINION—Filed Oct. 9, 1933

A judgment was recovered against Hartford Accident & Indemnity Company, the appellant, in a suit based on a declaration filed by the Delta & Pine Land Company upon a fidelity bond covering officers and employees of the Delta & Pine Land Company for various sums set opposite the names of these officers and employees in a schedule attached to the bond and known as a Fidelity Schedule Bond. The appellant was at the date of the contract, and since, authorized to do business in this state, and subject to process therein.

The appellee, Delta & Pine Land Company, sought to recover $2,703.79 because of the alleged default of H. H. Harris, listed in all the schedules as the treasurer of the appellee at Memphis, Tennessee, and whose fidelity was indemnified by the Hartford Accident & Indemity Company in the sum of $25,000.00. The contract of indemnity was amended from time to time, but at all times it appeared that H. H. Harris, Treasurer, was located at Memphis, Tennessee.

In the declaration it was alleged that subsequent to the contract of indemnity the Delta & Pine Land Company removed its office from Memphis, Tennessee, to Scott, Mississippi. The defalcations of Harris, the treasurer, for which liability was sought to be enforced against the in-[fol. 49] demnity company, were alleged to have occurred on various dates between May 9, 1929 and September 20, 1929, and all occurred in Bolivar County, Mississippi. It was further alleged that the appellee discovered these defalcations on May 24, 1931, and immediately gave notice thereof to the appellant, and within three months thereafter filed with the appellant at its home office at Hartford, Connecticut, affirmative proof of its loss, and brought its suit within twelve months of the filing of the proof of loss. The schedule shows employees covered by the fidelity bond at Memphis, Tennessee, Scott, Lamont, Deeson, Estill and Lake Cormorant, Mississippi. It furthers appears from the contract that the appellant indemnified the appellee, or the loss to it, for a specific sum as to each employee, as, for instance, H. H. Harris, Treasurer, Memphis, Tenn., $25,000.00.

The bond contained the following provision:

"Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing construction hereof then within the shortest period of limitation permitted by such law."

The bond also contained the following provision:

"The Hartford Accident and Indemnity Company, (hereinafter called Surety), in consideration of an agreed premium, binds itself to pay to Delta & Pine Land Co., of Mississippi, and/or Delta Farms Co., and/or Empire Plantation Co. (as their interest may appear) (hereinafter called the Employer), within sixty (60) days after satisfactory proof thereof, such pecuniary loss as the Employer shall have sustained of money or other personal property (including money or other personal property for which the

[fol. 50] Employer is responsible) through the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or wilful misapplication committed directly or in connivance with others by any of the employees named upon the schedule attached hereto and made a part hereof, in any position, anywhere, during the period commencing with the respective dates set opposite the names of the employees in such schedule, and ending with the termination of the suretyship for any employee by his dismissal or retirement from the service of the Employer, by the discovery of loss, hereunder, or by cancellation by the Employer or the Surety."

The appellant filed the following plea:

"Now comes Hartford Accident & Indemnity Company and for plea says that plaintiff should not have its action because plaintiff before and at the date of the contract of suretyship herein sued upon was doing business in the State of Tennessee and had its principal office at Memphis, in said State, and defendant was also then, as it is now, doing business in the State of Tennessee and had an Agency at Memphis, in said State, and plaintiff through its said office at Memphis, in said State, applied to defendant through its said Agency at Memphis, in said State, for said bond, rider and schedules containing the name of the defaulting employee, H. H. Harris, constituting said contract of suretyship, and defendant through its said Agency at Memphis, executed and delivered the same to plaintiff at its said office at Memphis, in said State, and said contract is a Tennessee contract and is governed by the laws of Tennessee and full faith and credit must be given thereto in the courts of this State under and in accordance with the requirements of Article 4, Section 1; Article 1, Section 10, and Section 1, of the Fourteenth Amendment of the Constitution of the United States, and there was not [fol. 51] then and there is not now any statute in the State of Tennessee that prohibits and renders invalid the condition or limitation in said contract hereinafter mentioned, and the highest court of the State of Tennessee, to-wit, the Supreme Court, has held and announced as the law in Tennessee in a number of its decisions, to-wit, Guthrie v. Indemnity Association, 101 Tenn. 643, Phoenis Cotton Oil

Co. v. Royal Indemnity Co., 140 Tenn. 438; City of Bristol v. Bostwick, 146 Tenn. 205, and other cases, that such conditions or limitations in such contracts are valid and binding; and said contracts of suretyship herein sued upon provided that any claim thereunder must be duly made upon the defendant, the surety, within (15) months after the termination of the suretyship for the defaulting employee, and plaintiff did not make claim for its loss upon defendant, the surety, within fifteen (15) months after the termination of its suretyship for said defaulting employee, Harris, in that said contract of suretyship was canceled and thereby terminated December 31, 1929, and plaintiff did not make claim upon defendant until June 22, 1931; and this defendant is ready to verify."

To this plea the appellee filed a demurrer on the ground that the construction and validity of the provision requiring claim thereunder to be made within fifteen months after the termination of the suretyship for the defaulting employee was not to be determined by the laws of Tennessee, but by the laws of Mississippi, and that this provision violated Section 2294 of the Mississippi Code of 1930 and the public policy of Mississippi; and further that the courts of Mississippi were not required to give full faith and credit thereto under and in accordance with Article 4, Section 1; Article 1, Section 10; and Section 1 of the Fourteenth Amendment of the Constitution of the United States.
[fol. 52] The court sustained the demurrer to this plea, the Indemnity Company declined to plead further, and thereupopn judgment was rendered against it for the defalcation of Harris.

It is to be conceded that under the adjudicated decisions of the Supreme Court of Tennessee, cited in the plea, the provision for notice of fifteen months is a limitation of liability and not a limitation of action. The converse is true in Mississippi, and the provision is a limitation of the action in this case, our statute of limitation being for six years, Section 2294, Code 1930. Sovereign Camp, W. O. W. vs. Miller, 125 Miss. 502, 87 So. 892; Standard Accident Insurance Co. vs. Broom, 111 Miss. 409, 71 So. 653; Illinois Central R. R. Co. vs. Jordan, 108 Miss. 140, 66 So. 406; General Accident, Fire and Life Ins. Co. vs. Walker, 99 Miss. 404, 55 So. 404, 55 So. 51; Dodson vs. Western Union Telegraph

Co., 97 Miss. 104, 52 So. 693. The cases of Berry vs. Lamar Life Ins. Co., 165 Miss. 405, 142 So. 445, and New York Life Ins. Co. vs. Alexander, 122 Miss. 813, 85 So. 93 are clearly differentiated from the others cited above, and in the case of Berry vs. Lamar Life Ins. Co., supra, it is pointed out that the limitation there under review was a condition precedent to the liability imposed upon the insurance company, and not a limitation upon the time in which the action should be brought.

Viewing the contract as a whole, there is no question but that this fidelity bond, or indemnity contract, was entered into and consummated in the State of Tennessee, where the Delta & Pine Land Company had its office and also the agent of the Indemnity Company had its office. The policy was delivered there, and so far as the language of the contract is concerned, as set forth in the statement of facts, this contract was a Tennessee contract. A contract is made at the [fol. 53] time when the last act necessary for its formation is done, and at the place where that final act is done. American Law Institute's Restatement of Law, Conflict of Laws, Tentative Draft No. 4, Sections 370 and 371. Couret vs. Conner, 118 Miss. 374, 392, and authorities there cited. And where the contract is silent, the place of the making of the contract is presumed to be the place of performance,—in this case the payment by the indemnity company of any default of any of the employees of the appellee. See Jones vs. Perkins, 29 Miss. 139, 64 Am. Dec. 136.

But clearly under Section 5131, Code 1930, defining insurance, this indemnity bond is a contract of insurance within the purview of that statute; and, further, it being expressly provided therein that all contracts of insurance on property, lives or interests in this state shall be deemed to be made therein, in our judgment, makes the contract herein under review a Mississippi contract and solvable under the laws of this state. The contract here provided or stipulated that the appellee should be indemnified from loss by the defalcation of H. H. Harris in any position anywhere, and when he, the employee and the insured herein, removed to Mississippi and there defaulted, so far as the appellee is concerned its interest was insured or indemnified by the appellant in Mississippi, and, under the provision quoted from the above statute, became operative, and this state is obligated to enforce it, as a Mississippi contract,

although it contained all the elements necessary to make it a Tennessee contract, but for the statute.

This court is committed to the proposition that if lives or property is insured in this state, although the contract be made in another state, the contract is solvable under the laws of our own state. Fidelity Mutual Insurance Co. vs. [fol. 54] Miazza, 93 Miss. 18, 46 So. 817; Stuyvesant Ins. Co. vs. Smith Motor Sales Co., 135 Miss. 585, 99 So. 575. The contract of indemnity in the case at bar, in our opinion, permitted the removal of employees to any place and indemnified against loss wheresoever it occurred. There being an interest of the appellee indemnified, and the employee having removed to Mississippi and his defalcation having occurred therein, whereby the appellee sustained a loss, and under the terms of the contract no notice of said removal being required, the contract became an indemnity contract against loss of interest of the appellee in this state. When the statute declares that such a contract shall be deemed to be made in this state, it means that the conflict of law between the two states is eliminated, and thereby, under the above authorities, a contract for fifteen months' notice was a limitation of the action enforceable as such in this state.

Affirmed.

[File endorsement omitted.]

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[fol. 55] In Supreme Court of Mississippi

No. 30445

Hartford Accident & Indemnity Company

vs.

Delta & Pine Land Company

Judgment—Oct. 9, 1933

This cause having been submitted at a former Term of this court on the record herein from the Circuit Court of Bolivar County and this court having sufficiently examined and considered the same and being of the opinion that there

is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 18th day of October 1932, be and the same is hereby affirmed. It is further ordered and adjudged that the appellee do have and recover of and from the appellant and United States Fidelity & Guaranty Company, surety on the supersedeas appeal bond herein the sum of $2,703.79 the amount of the judgment in the court below together with interest at the rate of 6 per centum per annum from the 27th day of August 1931 until paid, also the further sum of $142.95 being damages at the rate of 5 per centum as allowed by statute, also all of the costs of this court and in the court below to be taxed, etc.

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[fol. 56] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUGGESTION OF ERROR OF HARTFORD ACCIDENT AND INDEMNITY COMPANY—Filed Oct. 23, 1933

Appellant Hartford Accident & Indemnity Company respectfully suggest that—

1. The court erred in its decision in holding that Section 5131 and Section 2294 of the Mississippi Code of 1930 are applicable to the contract of insurance in suit, because in so holding those statutes are made to violate the due process clause, (Art. 1, Sec. 10); the full faith and credit clause, (Art. 4, Sec. 1); and the contract impairment clause, (14th Amendment, Art. 14; Sec. 1), of the Constitution of the United States; and

2. The court erred in holding that the contract of insurance in suit was on an interest in the State of Mississippi.

Wherefore, it prays that the court withdraw its opinion, reconsider its decision, set aside its judgment of affirmance and reverse the judgment of the Circuit Court and enter judgment here accordingly.

(Signed) Wm. M. & Wm. G. Hall, Counsel for Appellant.

[fol. 57] I hereby certify that I have this day mailed, postage prepaid, to Sillers & Roberts, Rosedale, Mississippi,

counsel for appellee, a true copy of the foregoing Suggestion of Error.

Memphis, Tennessee, this the 21 day of October, A. D. 1933.

(Signed) Wm. M. Hall, of Counsel for Appellant.

[File endorsement omitted.]

[fols. 58-61] In Supreme Court of Mississippi

[Title omitted]

Order Overruling Suggestion of Error Nov. 6, 1933

This cause this day came on to be heard on the suggestion of error filed herein and this court having sufficiently examined and considered the same and being of the opinion that the same should be overruled, doth order and adjudge that said suggestion of error be and the same is hereby overruled.

[fol. 62] [File endorsement omitted]

In Supreme Court of Mississippi

[Title omitted]

Assignment of Errors—Filed Nov. 15, 1933

Appellants, Hartford Accident & Indemnity Company and United States Fidelity & Guaranty Company, assign the following errors in the record and proceedings in above entitled cause, to-wit:

I

The Supreme Court of Mississippi erred in holding that under Section 5131 of the Mississippi Code of 1930 that the bond or policy of insurance sued upon, made and to be performed in Tennessee, was to be deemed to have been made in Mississippi and solvable under the laws of Mississippi because upon an interest in Mississippi; and therefore under Section 2294, Mississippi Code of 1930 the pro-

vision of said bond or policy that claim thereunder must be made upon the surety within fifteen months after termination of the suretyship, valid under the laws of Tennessee, was null and void because in conflict with the limitation on actions upon such contracts prescribed by the laws of Mississippi, in that said statutes in such construction and application were made repugnant to Article XIV, Section 1 and Article IV, Section 1 of the Constitution of the United States.

II

The Supreme Court of Mississippi erred in holding that the bond or policy sued upon was upon an interest in the State of Mississippi.

[fols. 63-69] For which errors they pray that the decision and judgment of the Supreme Court of Mississippi rendered on the 9th day of October 1933 in the above-entitled cause be reversed and that judgment be rendered in their favor.

Wm. M. Hall, Counsel for Appellants.

[fol. 70] [File endorsement omitted]

IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER ALLOWING APPEAL TO SUPREME COURT OF UNITED STATES—Filed Nov. 15, 1933

Petition of Hartford Accident & Indemnity Company and United States Fidelity & Guaranty Company for appeal of the above case to the Supreme Court of the United States from the Supreme Court of the State of Mississippi, Assignment of Errors filed therewith and Statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Mississippi therein, and the record of said cause, having been considered; it is ordered that an appeal be and is hereby allowed as prayed in said petition, and that petitioners shall give good and sufficient security in the sum of Fifty Six Hundred, Ninety Three and Forty Eight One

Hundredths Dollars ($5693.48) that said appellants shall prosecute said appeal to effect and if they fail so to do shall answer for all damages and costs, and petitioners now presenting a bond in the sum of $5693.48 with Fidelity & Deposit Company of Maryland, of Baltimore, Maryland, as surety, so conditioned, it is ordered that the same be and is hereby approved; and that the Clerk of the Supreme Court of Mississippi shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within forty days from the date hereof.

[fols. 71–85] It is further ordered that said appeal shall operate as a supersedeas.

This the 15th day of November, A. D. 1933.

Sydney Smith, Chief Justice of the Supreme Court of Mississippi.

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[fol. 86] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Dec. 13, 1933

Now come Hartford Accident & Indemnity Company and United States Fidelity & Guaranty Company, Appellants in above styled cause, and adopt their Assignments of Error as their statement of the points to be relied upon, and state that only the following parts of the record as filed in this court are deemed necessary to be printed for the consideration of those points, viz:

1. Title of Case.
2. Declaration and the following exhibits:

Exhibit "A" (Schedule Bond with Schedule of Employees).

Exhibit "B" (Rider to Bond).

Exhibit "C" (Schedule Bond—Employees of Delta & Pine Land Company of Mississippi and/or Delta Farms and/or Empire Plantation Company).

Exhibit "D" (Acceptance of change in Schedule of Employees).

Exhibit "E" (Acceptance of change in Schedule of Employees).

3. Plea of Hartford Accident & Indemnity Company.
4. Demurrer of Delta & Pine Land Company of Mississippi.
5. Judgment of Circuit Court.
[fol. 87] 6. Assignment of Errors in the action of the Circuit Court.
7. Opinion Supreme Court of Mississippi, Division A, McGowen, J.
8. Judgment of the Supreme Court of Mississippi.
9. Suggestion of Error of Hartford Accident & Indemnity Company.
10. Judgment of the Supreme Court of Mississippi overruling Suggestion of Error.
11. Assignment of Errors of Hartford Accident & Indemnity Company and United States Fidelity & Guaranty Company in appeal from the judgment of the Supreme Court of Mississippi to the Supreme Court of the United States.

This the 8th day of December, A. D. 1933.

Wm. M. Hall, Counsel for Appellants.

Service of above is hereby acknowledged, this the 8th day of December, A. D. 1933.

Garner W. Green, Counsel for Appellee.

[fol. 88] [File endorsement omitted.]

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Endorsed on cover: File No. 38,253. Mississippi Supreme Court. Term No. 650. Hartford Accident & Indemnity Company and United States Fidelity & Guaranty Company, appellants, vs. Delta & Pine Land Company. Filed December 13, 1933. File No. 650, O. T., 1933.

(4453)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

# No. 650

HARTFORD ACCIDENT & INDEMNITY COMPANY AND UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANTS,

*vs.*

DELTA & PINE LAND COMPANY.

## STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES UPON APPEAL TO REVIEW JUDGMENT OF THE SUPREME COURT OF MISSISSIPPI.

Petitioners, Hartford Accident & Indemnity Company and United States Fidelity & Guaranty Company, submit in compliance with Rule 12 of the Supreme Court of the United States the following statement of the basis of the jurisdiction of the Supreme Court of the United States upon appeal to review the judgment of the Supreme Court of Mississippi in the above entitled cause.

### A.

### Provision Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section

237, amended, Judicial Code, being Section 344, U. S. C. A. Title 28.

B.

**Statutes of the State of Mississippi the Validity of Which is Involved.**

The statutes of Mississippi, the validity of which is involved, are Section 5131 and Section 2294 of the Mississippi Code of 1930.

Section 5131 is in words as follows:

> "A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction, loss or injury of something in which the assured or other party has an interest, as an indemnity therefor; and it shall be unlawful for any company to make any contract of insurance upon, or concerning any property or interest or lives in this state, or with any resident thereof; or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance unless and except as authorized under the provisions of this chapter. All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein."

The concluding sentence is the particular provision in question.

Section 2294 is in words as follows:

> "The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants."

C.

**Date of Judgment and Date of Application for Appeal.**

The judgment of the Supreme Court of Mississippi sought to be reviewed was rendered on the 9th day of October, 1933, and the application for appeal was presented on the 15th day of November, 1933, this Statement of Jurisdiction being presented therewith.

D.

**Nature of the Case and Ruling of the Supreme Court of Mississippi.**

Delta & Pine Land Company sued Hartford Accident & Indemnity Company to recover the amount of losses sustained by the default of an employee occurring in Mississippi, under a fidelity bond or policy of insurance indemnifying against pecuniary losses of money or other personal property through the fraud, etc., of employees, which contained the provision that any claim thereunder must be duly made upon the surety within fifteen months after the termination of the suretyship for the defaulting employee, and Hartford Accident & Indemnity Company pleaded in bar in substance and effect that the bond or policy was made and delivered in the State of Tennessee, and that the provision in question was valid under the laws of Tennessee, and that full faith and credit must be given to the laws of Tennessee in that respect under the requirements of the Constitution of the United States, and that the contract was terminated December 31, 1929, and claim was not made upon the surety until June 22, 1931, and Delta & Pine Land Company demurred thereto on the ground that the validity of the provision in question was determined by the laws of Mississippi and that it was void under Section 2294 of the Mississippi Code of 1930, and

the trial court sustained the demurrer, and upon defendant declining to plead further rendered judgment and Hartford Accident & Indemnity Company appealed therefrom to the Supreme Court of Mississippi, and the Supreme Court of Mississippi held in effect that said Code Section 5131 made the bond or policy a Mississippi contract subject to the laws of Mississippi, and that said Code Section 2294 rendered said provision of the bond or policy null and void and affirmed the judgment of the trial court and rendered judgment against Hartford Accident & Indemnity Company and the surety on its appeal bond, United States Fidelity & Guaranty Company, and on November 6, 1933, denied a suggestion of error seeking a rehearing and reconsideration, wherein it was contended that said Sections 5131 and 2294 were by said holding made to violate the due process clause, the full faith and credit clause and the contract impairment clause of the Constitution of the United States.

E.

**Cases Sustaining Jurisdiction of the Supreme Court of the United States.**

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States upon appeal to review the judgment of the Supreme Court of Mississippi in above entitled cause: *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 74 L. Ed. 926; *Ætna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 69 L. Ed. 342.

Wm. M. Hall,
*Counsel for Petitioners (Appellants).*

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FEB 10 1934
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

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# No. 650

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HARTFORD ACCIDENT & INDEMNITY COMPANY AND UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANTS,

*vs.*

DELTA & PINE LAND COMPANY.

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APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

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## BRIEF FOR APPELLANT.

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WM. M. HALL,
*Counsel for Appellants.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1933**

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# No. 650

---

HARTFORD ACCIDENT & INDEMNITY COMPANY AND UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANTS,

*vs.*

DELTA & PINE LAND COMPANY.

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APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

(NOT YET OFFICIALLY REPORTED, BUT NOW REPORTED IN 150 So. 205.)

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## BRIEF FOR APPELLANT.

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### Statement of the Case.

In referring herein to Appellant, Hartford Accident & Indemnity Company, will be meant, the other Appellant having been merely its appeal surety below.

Appellee, plaintiff below, sued Appellant, defendant below, in the Circuit Court of Bolivar County, Mississippi, upon a fidelity bond to recover a loss sustained by Appel-

lee through the fraud committed by its Treasurer named in the Schedule of Employees annexed thereto, and Appellant defended on the ground that its undertaking in and by said bond was conditioned upon Appellee making claim upon it within fifteen months after termination of the suretyship for the defaulting employee, and that its suretyship for him was terminated December 31, 1929, and Appellee did not make claim upon Appellant until June 22, 1931, which was more than fifteen months after the termination of the suretyship, and that Appellee through its principal office at Memphis, in the State of Tennessee, had applied to Appellant through its Agency at Memphis, in that State, for this bond, rider and schedule, and Appellant through its said Agency executed and delivered it to Appellee at its office in Memphis, and that the bond was a Tennessee contract governed by the laws of Tennessee and that such condition under the law of Tennessee was valid and binding and that full faith and credit had to be given thereto in the courts of Mississippi under and in accordance with the requirements of Article IV, Section 1; Article I, Section 10 and Section 1 of the Fourteenth Amendment of the Constitution of the United States (R. 1-18, R. 18-19). Appellee demurred to Appellant's plea wherein that defense was set up, on the ground that the condition in question was invalid under Section 2294 of the Mississippi Code of 1930, which declared null and void a change of the general six-year limitation of actions, and the public policy of Mississippi, and that the courts were not required to give full faith and credit in accordance with the requirements of the Constitution as contended in Appellant's plea (R. 20).

Appellee's declaration in the case showed that Appellee was incorporated under the laws of Mississippi and at the time of the suit had its principal place of business in

the town of Scott, Bolivar County, Mississippi; and that Appellant was incorporated under the laws of Connecticut with its principal place of business at Hartford, in that State, and was qualified and authorized to do business in the State of Mississippi. The schedule attached to the bond and made part of the declaration (R. 2), showed the executive officers, President, Vice-President, Treasurer and Secretary, to be located at Memphis, in Tennessee. The schedule also showed various employees in positions at various places in the State of Mississippi (R. 13, 16). The declaration further showed that the losses on account of its Treasurer occurred in Bolivar County, Mississippi (R. 9). Appellant's undertaking in and by the bond was to pay such pecuniary loss as the Appellee should sustain of money or other personal property (including money or personal property for which the employer was responsible), through the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or willful misapplication committed "in any position, any where", during the period commencing with the dates set opposite the names of the employees in the schedule (R. 11).

The demurrer was sustained and Appellant declining to plead further, judgment was rendered against Appellant for the amount of the demand. From that judgment Appellant appealed to the Supreme Court of Mississippi, assigning as error for its reversal the action of the Circuit Court in sustaining the demurrer because the provision of the bond requiring claim thereunder to be made within fifteen months after termination of the suretyship which Appellee had not complied with, was valid under the law of Tennessee, and the law of Tennessee and not the law of Mississippi governed, and the courts of Mississippi had to give full faith and credit thereto and could not apply its statute (Sec. 2294, Code 1930), in view of Article IV, Sec-

tion 1; Article I, Section 10 and Section 1 of the Fourteenth Amendment of the Constitution of the United States (R. 22). The Supreme Court of Mississippi affirmed the judgment of the Circuit Court, holding, in an Opinion appearing in the record beginning on page 23, now reported in 150 So. R. 205, in substance and effect, that the fidelity bond or indemnity contract was entered into and consummated in Tennessee where Appellee and Appellant had their respective offices, and that that was the place of performance, performance being payment of an employee's default (R. 27), but that the contract in providing for indemnity from the defalcation of its Treasurer Harris "in any position, any where", and Appellee and the Treasurer subsequently moving to Mississippi and the default there occurring, was upon an interest in Mississippi and under Section 5131, Code 1930 defining insurance, and providing that "all contracts of insurance on property, lives or interests in this State shall be deemed to be made therein", made it a Mississippi contract and subject to said Section 2294, which section under the Mississippi decisions rendered the fifteen months provision null and void as a limitation of action for a shorter period than the general statute of limitation of six years (R. 27, 26, 28).

It was not expressly stated in the declaration that after the bond was made Appellee moved its office from Memphis to Mississippi and its Treasurer moved with it to Mississippi, but Appellant conceded that that was inferable from the allegations in the declaration.

Section 5131 of the Mississippi Code of 1930 applied by the Supreme Court of Mississippi with the above mentioned result reads as follows:

> "A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the as-

> sured, upon the destruction, loss or injury of something in which the assured or other party has an interest, as an indemnity therefor; and it shall be unlawful for any company to make any contract of insurance upon, or concerning any property or interest or lives in this state, or with any resident thereof; or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance unless and except as authorized under the provisions of this chapter. All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein."

Said Section 2294 which that court applied as a result of its application of Section 5131 striking the fifteen months provision from the contract, reads as follows:

> "The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants."

As will be seen from reading its opinion, the court did not say in terms that the due process clause (Article XIV, Section 1), and the full faith and credit clause (Article IV, Section 1), of the Constitution of the United States did not prevent the application of Sections 5131 and 2294 of the Mississippi Code to the contract and the fifteen months provision therein, but it necessarily so held since those provisions of the Constitution were asserted in Appellant's plea as preventing the application of Section 2294, and were asserted on appeal in its assignment of errors as preventing the application of the Mississippi statute to the contract and the fifteen months provision therein. Appellant after the court's decision asserted

these provisions in a suggestion of error for a rehearing as preventing the application of Sections 5131 and 2294 to the contract in suit, as indicating error in its decision, which suggestion of error was overruled without an opinion (R. 29, 30).

**Specification of Assigned Errors Relied Upon.**

Appellant assigned as errors in its appeal and relies upon the following:

I.

The Supreme Court of Mississippi erred in holding that under Section 5131 of the Mississippi Code of 1930 that the bond or policy of insurance sued upon, made and to be performed in Tennessee, was to be deemed to have been made in Mississippi and solvable under the laws of Mississippi because upon an interest in Mississippi, and therefore under Section 2294, Mississippi Code of 1930 the provision of said bond or policy that claim thereunder must be made upon the surety within fifteen months after termination of the suretyship, valid under the laws of Tennessee, was null and void because in conflict with the limitation on actions upon such contracts prescribed by the laws of Mississippi, in that said statutes in such construction and application were made repugnant to Article XIV, Section 1 and Article IV, Section 1 of the Constitution of the United States.

II.

The Supreme Court of Mississippi erred in holding that the bond or policy sued upon was upon an interest in the State of Mississippi (R. 30-31).

## Summary of Argument.

POINT I.

There being "an interest in Mississippi" with respect to which the contract was made, if there was in truth such an interest, did not warrant the application of the Mississippi statutes to the contract, because the parties had the right to contract with respect thereto in Tennessee and the laws of that state entered into the contract and gave them rights which they and each of them were protected in by the due process clause and the full faith and credit clause of the Constitution.

POINT II.

There was no "interest in Mississippi", in any proper sense, to control the validity of the contract.

## ARGUMENT.

POINT I.

**There being "an interest in Mississippi" with respect to which the contract was made, if there was in truth such an interest, did not warrant the application of the Mississippi statutes to the contract, because the parties had the right to contract with respect thereto in Tennessee and the laws of that State entered into the contract and gave them rights which they and each of them were protected in by the due process clause and the full faith and credit clause of the Constitution.**

As the Court has seen from the statement of the case, the contract provision which the Mississippi Court in its decision attempts to deprive Appellant of, was a right which that Court concedes was actually acquired in Tennessee and was valid there; also that it concedes that the

contract which it was an important part of, was to be performed in Tennessee. As the Court has seen, the Mississippi Court predicates upon the application of Section 5131 to the contract, its right asserted in its decision to deprive Appellant of that provision and right under Section 2294. As the Court has seen, the sole reason for its holding that Section 5131 applies to the contract, is that it was upon an "interest in Mississippi." There is no suggestion that these two corporations did not have the right to contract in Tennessee where both were doing business when the contract was made.

That there was an "interest in Mississippi" was determined, as will be seen, upon the ground that the provision of the contract that Appellee was to be indemnified against its officers' or employees' default committed "in any position, anywhere," and that Appellee moved its offices in which the defaulting Treasurer worked from Tennessee to Mississippi and the Treasurer went to Mississippi with it and there defaulted, materialized that potential interest represented by such provision into an actual "interest in Mississippi." Whether or not an "interest in Mississippi" resulted in that way, will be considered under Point II. Under Point I will be discussed solely whether the contract of insurance being on an interest in Mississippi, which we concede for the purposes of the argument but not further, warranted the Mississippi Court's application of Sections 5131 and 2294 to the contract and the fifteen months' provision.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. Ed. 832, this Court held, in effect, that neither the location of the property which the insurance covered nor the citizenship or residence of the contracting parties but the place where the contract was made and to be performed, determined the laws applicable thereto; in other words, that the laws

of the state where the property insured was located and the contracting parties had their citizenship or resided were not applicable by reason thereof to a contract made by the parties and to be performed in another state. In this case the State of Louisiana sued a citizen of that State to recover a penalty under a statute of Louisiana which prohibited the making of an insurance contract of the kind on property in that State, in a company not doing business in the State in compliance with its laws, under penalty of a fine, the defendant, a citizen of the State, having secured coverage under an open marine policy on bales of cotton which he had in the State of Louisiana, in the State of New York with a company that was not qualified to do business in Louisiana, and the Louisiana courts held the defendant liable, and this Court on review, reversed the judgment, holding that the Louisiana statute could not be applied to the act of the parties resulting in a contract in the State of New York, under the right of contract and due process clauses of the Constitution. The "right of contract" clause was the prime influence in that decision, but that decision also necessarily in effect ruled that the location of the property and the residence of the parties securing the contract, did not warrant the application of the Louisiana statute to the acts and the contract resulting therefrom, done in New York.

That has been recognized and adhered to and the idea reenforced in subsequent cases in this Court involving the application of the laws of one state to insurance contracts made in another. *New York Life Ins. Co.* v. *Head*, 234 U. S. 149, 58 L. Ed. 1259; *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357, 62 L. Ed. 772; *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 69 L. Ed. 342; *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 74 L. Ed. 926.

It appears that the only other State in the Union besides Mississippi, having a concluding provision in its

general statute like the concluding clause in Section 5131, *viz*, "All contracts of insurance on property, lives or interests in this State shall be deemed to be made therein," is Massachusetts (32 C. J., p. 979, Sec. 8, p. 980, Notes 69 and 70), and as it happens the Supreme Court of Massachusetts was called upon in the case of *Stone* v. *Old Colony St. Ry. Co.*, 212 Mass. 459, 99 N. E. 218, to determine the applicability of that provision to a contract of casualty insurance made by a street railway company incorporated in that State, in the State of Pennsylvania with a mutual casualty association incorporated under the laws of that State, against casualty liabilities in Massachusetts, in a suit by the receiver of the association to recover additional assessments, in defense of which the Railway Company had set up the invalidity of the contract because not made with a company doing business in the State, and it was contended that the provision in question made the contract a Massachusetts contract and therefore violative of its statute (the statute violated being like the part of Section 5131 preceding the provision in question); and the court held that the statute would not be construed as applying to a contract made in another State, because so to do would be to give it extra territorial operation which the Constitution prohibited. It is not expressly stated in the opinion that the construction contended for was refused because it would be rendered violative of the Federal Constitution, but that is implied by the Court's citation in support of its conclusions of *Johnson* v. *Mutual Life Ins. Co.*, 180 Mass. 407, 62 N. E. 733, 63 L. R. A., 833, in which that is suggested; and *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. Ed. 832. The Court said in part:

> "It is further contended that our courts should not lend their aid for the collection of the assessments. No express legislative prohibition however is found, and the concluding sentence in Sec. 3 of Chap. 522

of the St. of 1894, that 'all contracts of insurance on property, lives or interests in this commonwealth shall be deemed to be made therein,' should not be construed by implication as intended to regulate or prohibit contracts of insurance made in other jurisdictions. *Johnson* v. *Mutual Life Ins. Co. of N. Y.*, 180 Mass. 407, 409, 62 N. E. 733, 63 L. R. A. 833. It is settled that while an insurance broker who in violation of Section 98 solicits insurance in foreign companies which have not been licensed by the insurance commissioner may be prosecuted criminally, state legislation cannot deprive a citizen of the personal right to protect himself from loss, through insurance obtained on his property under a contract made outside of the state of his domicile. *Com.* v. *Nutting*, 175 Mass. 154, 55 N. E. 895, 78 Am. St. Rep. 483; *Nutting* v. *Mass.*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324; *Pierce* v. *People*, 106 Ill. 11; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *Delamater* v. *South Dakota*, 205 U. S. 93, 102, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733. The general rule, where enforcement of a foreign contract is sought against a party in the courts of his residence, has been stated in these words: 'If it is valid there it is to be deemed valid everywhere, and will stand an action in the courts of a state whose laws do not permit such contracts. *Scudder* v. *Union National Bank*, 91 U. S. 406, (23 L. Ed. 245). Even a contract expressly prohibited by the statutes of the state in which suit is brought, if it is not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the state as administered by its courts will refuse to entertain an action on such contracts made by one of its citizens brought in a suit in which the laws protect it.' *Milliken* v. *Pratt*, 125 Mass. 374, 375, (28 Am. Rep. 241).''.

In *Johnson* v. *Mutual Life Ins. Co.*, 180 Mass. 407, 62 N. E. 733, 63 L. R. A. 833, that suit was upon a policy of life insurance taken out by one domiciled in Massachusetts, in the State of New Hampshire or New York (it is not

stated in the opinion which), and the effort was made to apply the Massachusetts statute thereto which required a copy of the application referred to in the policy to be annexed to the policy, and the Supreme Court speaking through Judge Holmes, then Chief Justice of the Court, said in reference thereto:

> "Assuming that the proviso has the purpose just stated, such cases as we have seen upon kindred questions show that generally such statutes will be construed as intended to affect only contracts made within the jurisdiction. *Mutual L. Ins. Co.* v. *Cohen*, 179 U. S. 262, 265, 269, 45 L. Ed. 181, 184, 186, 21 Sup. Ct. Rep. 106; *Greisemer* v. *Mutual L. Ins. Co.*, 10 Wash. 202, 207, 38 Pac. 1031. Nothing was said, or could have been decided, in *Considine* v. *Metropolitan L. Ins. Co.*, or *Nugent* v. *Greenfield Life Asso.*, that extended the proviso to policies issued by foreign companies outside the commonwealth. The policies in both these cases were issued in Massachusetts. It would be most unusual for a state to try to regulate the form of contracts made outside of its jurisdiction, not reaching into the jurisdiction in their operation and not necessarily ever coming before its courts. Commonly such an attempt would be, not only impolitic but beyond its power. Probably the power of this state was not increased in that respect by the fact that the present defendant had complied with the laws of Massachusetts, and did business here. *Mutual L. Ins. Co.* v. *Cohen*, 179 U. S. 262, 269, 45 L. Ed. 181, 186, 21 Sup. Ct. Rep. 106, citing *Green* v. *Mutual L. Ins. Co.*, 10 Wash. 207, 38 Pac. 1031; *Belknap* v. *Johnston*, 114 Iowa, 265, 86 N. W. 267. But were it otherwise, we should need clear words or strong grounds of policy before supposing that the legislature had pressed its power to such an extreme. Certainly we should not force an unnatural construction upon plain language in order to reach so unusual a result."

It has been held in the courts of various States in cases in which was involved the application of statutes similar to that involved in *Johnson* v. *Mutual Life Ins. Co., supra,* that they could not be constitutionally applied to insurance contracts made in other States. See *Western Mass. Mut. Fire Ins. Co.* v. *Storage Co.,* 6 Pa. Super. Ct. 288; *Western Mass. Fire Ins. Co.* v. *Hilton,* 58 N. Y. S. 854, 42 App. Div. 52; *French* v. *People,* 6 Colo. App. 311, 40 Pac. 463; *Swing* v. *Hill,* 165 Ind. 411, 75 N. E. 658; *N. Y. Life Ins. Co.* v. *Long,* 177 Ky. 445, 197 S. W. 948; *Hammond* v. *International Ry. Co.,* 116 N. Y. S. 855; *Lumbermen's, etc. Ins. Co.* v. *Kansas City, Ft. S. & M. R. Co.,* 149 Mo. 165, 50 S. W. 281.

In a Note in 1 A. L. R., 1665, it is said:

> "Notwithstanding the broad powers which the states enjoy in respect of the conditions which may be imposed upon foreign insurance companies seeking to do business within their borders, statutes which attempt directly or in effect to forbid or penalize the making of contract of insurance outside the state, to be performed outside the state, upon property within the state or upon the lives of residents of the state, or to make such contracts a subject or source of taxation, have been quite consistently condemned as in violation of the 14th Amendment."

See also Supplemental Note in 32 A. L. R. 636.

The reason for the rule of these cases is doubtless that the contract of insurance is not "intrinsically and inherently local," (*N. Y. Life Ins. Co.* v. *Head,* 234 U. S. 149, 161, 58 L. Ed. 1259, 1264), and corporations as well as individuals where not restricted by laws entering into their charters have the right to contract where ever they may have been admitted to do business, (*Mutual Life Ins. Co.* v. *Cohen,* 179 U. S. 262, 45 L. Ed. 181), and the legality of their acts resulting in the contract and rights thereunder,

are determined and fixed by the laws of the place where done.

The obstacle in the way of the application of the laws of one state to contracts made and to be performed in another is primarily the full faith and credit clause of the Constitution, because such an application would be to set at naught the laws of the state where the contract is made, it being settled that the laws of that state enter into and become part of the contract, (*Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 399, 69 L. Ed. 342, 349), and the due process clause of the 14th Amendment, Sec. 1, in combination with it. The idea was expressed by Chief Justice White in *N. Y. Life Ins. Co.* v. *Head*, 234 U. S. 149, 161, 58 L. Ed. 1259, 1264, in the following language:

> "Such question, we think, admits of but one answer, since it would be impossible to permit statutes of Missouri to operate beyond the jurisdiction of that state and in the state of New York, and thereby destroy freedom of contract without throwing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority, and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question, and hence authorities directly dealing with it do not abound. The principle, however, lies at the foundation of the full faith and credit clause and the many rulings which have been given effect to that clause."

It is respectfully submitted that these authorities amply sustain the contention that an "interest in Mississippi" did not warrant the application of Section 5131 for the purpose of bringing into play Section 2294, under the due process clause and the full faith and credit clause of the Constitution. Indeed, the Supreme Court of Mississippi

should have construed Section 5131 as did the Massachusetts Supreme Court and saved it from repugnancy to those clauses of the Constitution.

In view of the fact that it might be considered that the Mississippi Court suggested the fact of Appellee's removal of its principal office from Tennessee to Mississippi and the occurrence there of the contingency insured or indemnified against, as grounds warranting the application of Sections 5131 and 2294, the sufficiency of that under the authorities will be discussed before passing from the point. It is not perceivable how the removal of Appellee and its Treasurer from Tennessee to Mississippi and the occurrence in Mississippi of the contingency insured against could make the contract made in Tennessee with the Tennessee laws incorporated therein any less a Tennessee contract which Appellant had a valuable right in; in other words, convert it into a Mississippi contract in the face of the full faith and credit clause of the Constitution. The record does not disclose any change in the contract between the parties that could be taken as constituting it a new contract made at that time in Mississippi. It is submitted that it would take some express act on the part of the Appellant to constitute a waiver of the fifteen months provision validly incorporated into the contract under the laws of Tennessee.

It is submitted that this Court's decision in *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 69 L. Ed. 342, decided that proposition in accordance with Appellant's contention. In that case there was a suit in a Texas court upon a policy of life insurance which assured, while a resident of Tennessee, secured from the Aetna Life Insurance Company, through its Agency at Nashville, in that State, and subsequently the assured had removed to the State of Texas where he had died, and it appeared that the Aetna Life Insurance Company was doing business in the State of Texas

at the time of assured's death and had been doing business in Texas when the contract with it was made in Tennessee at its agency there, and the Texas Court of Appeals had held, as will be seen by reference to the report of its decision in 248 S. W. 165, that because the Aetna Life Insurance Company was doing business in the State of Texas at the time stated, it had subjected itself to the laws of Texas and the policy was a Texas contract and the Texas statute imposing a penalty for nonpayment within thirty days after demand, applied, and this Court upon review reversed the decision of the Texas court, holding that the contract was a Tennessee contract and that the Texas statute could not be applied thereto without doing violence to the full faith and credit clause of the Constitution of the United States. It is notable that the Texas statute in question contained terms that were about as susceptible of that construction as the Mississippi statute on this theory; *viz*: "Any contract of insurance payable to any citizen or inhabitant of this State by an insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed, and the premiums and policy (in case it becomes a demand), should be payable within this State, or at the Home Office of the company or corporation issuing the same."

It has been expressly held in a number of cases in the State courts under life insurance policies that the removal of the assured to and death in another State did not make it a contract of that State subject to its laws. See *U. S. Mortgage & Trust Co.* v. *Ruggles*, 258 N. Y. 32, 179 N. E. 250; *Bowen* v. *Interstate Business Men's Ass'n.*, 182 Wis. 223, 196 N. W. 229. The same is the implication of the deci-

sions of other State courts. See *Gill* v. *Sovereign Camp W. O. W.*, 209 Mo. App. 63, 236 S. W. 1073; *Cleary* v. *Union Central Life Ins. Co.*, 143 Ky. 540, 136 S. W. 1014, 33 L. R. A. N. S. 881; *Union Central Life Ins. Co.* v. *Barnes* (Ky.), 194 S. W. 339; *Dolan* v. *Royal Neighbors*, 123 Mo. App. 54, 100 S. W. 500; *Roberts* v. *Modern Woodmen*, 133 Mo. App., 207, 113 S. W. 726.

Any contention that the Mississippi Courts could refuse to enforce the fifteen months provision in the contract because against the public policy expressed in Section 2294, would be answered and overcome by this Court's ruling in *Home Ins. Co.* v. *Dick*, 281 U. S. 394, 410, 74 L. Ed. 926, 934, the language of the Court being:

> "Dick urges that Article 5545 of the Texas law is a declaration of its public policy; and that a state may properly refuse to recognize foreign rights which violate its declared policy. Doubtless, a State may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy; and, under some circumstances, it may refuse to aid in the enforcement of such rights. *Bothwell* v. *Buckbee, M. Co.*, 275 U. S. 274, 277-279, 72 L. Ed. 277, 279, 280, 48 Sup. Ct. Rep. 124; *Union Trust Co.* v. *Grosman*, 245 U. S. 412, 62 L. Ed. 368, 38 Sup. Ct. Rep. 147; compare *Fauntleroy* v. *Lum*, 210 U. S. 230, 52 L. Ed. 1039, 28 Sup. Ct. Rep. 641. But the Mexican corporation never was in Texas; and *neither it nor the garnishees invoked the aid of the Texas courts or the Texas laws.* The Mexican corporation was not before the court. The garnishees were brought in by compulsory process. Neither has asked favors. They ask only to be let alone. We need not consider how far the State may go in imposing restrictions on the conduct of its own residents, and of foreign corporations which have received permission to do business within its borders; or how far it may go in refusing to lend the aid of its courts to the enforcement of rights ac-

quired outside its borders. It may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." (Italics ours.)

The Appellant here was in the same position in the Mississippi courts as the garnishees were in the Texas courts. It did not seek the aid of the Mississippi courts and was brought in by compulsory process and asked nothing of the Mississippi courts except that its rights in the terms of the contract made in Tennessee be left inviolate.

There is no room on the facts in this record for any contention that the parties went from Mississippi into Tennessee to make their contract in order to circumvent the laws of Mississippi. Appellee had its principal business office in Tennessee and Appellant had an Agency there under its qualification to do business in Tennessee, just as it had in Mississippi, and the Agency in Tennessee had no connection with the Agency in Mississippi.

The provision of Section 5131 under consideration here, can constitutionally be applied to and Section 2294 be brought into operation against objectionable provisions, in contracts actually made in Mississippi with reference to property, lives and interests therein, in which the parties have attempted by stipulation to make the laws of the State of the domicile of the insurer applicable thereto; without doing violence to the full faith and credit clause and the due process clause, but that is as far as it can constitutionally be allowed to go and should be limited to that, it is respectfully submitted

The Mississippi statute, Section 2294, cannot be allowed to strike the fifteen months provision from the bond under the due process clause. In *Home Insurance Co.* v. *Dick* it was expressly held that the laws of Texas could not affect the limitation for action stipulated in the contract, in view

of the due process clause of the Constitution. The Mississippi decision does not really deny this proposition, as it proceeded upon the assumption that Section 5131 made the bond a Mississippi contract and on that account subject to Section 2294, and in consequence it is to be taken that if Section 5131 is inapplicable for that purpose, Section 2294 could not be constitutionally applied to destroy the fifteen months provision. The full faith and credit clause is also involved in view of this Court's ruling in *N. Y. Life Ins. Co.* v. *Head, ante*, wherein it was said that that clause lies at the bottom of the application of the due process clause of the 14th Amendment, in such cases. In *Aetna Life Ins. Co.* v. *Dunken, ante*, it was held that the Texas penalty statute could not be applied to a contract made in Tennessee where there was no such statute, because of the full faith and credit clause, and doubtless upon that principle.

## Point II.

**There was no "interest in Mississippi", in any proper sense, to control the validity of the contract.**

Only in event this Court considers "an interest in Mississippi" sufficient to bring the Mississippi statutes into control of the contract, is it necessary to consider this proposition.

In such event this Court has jurisdiction to determine the question. *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 394, 69 L. Ed. 342, 347.

The character of bond involved here is called a fidelity bond or fidelity policy of insurance manifestly because it insures the fidelity of officers and employees. It can be said that the employer has an interest in the fidelity of the employee because of the employment and the risk of loss from the employment, which the employer can insure

against. The location of that interest would be where the officer or employee was serving the employer.

In the case at bar the officer of Appellee whose acts are in question was serving in Appellee's principal business office in the State of Tennessee where the bond was executed, delivered and accepted.

The location of such an insured interest as this, is necessarily at the place where the officer or employer is accountable. The correctness of that is well illustrated by the case of *Matthews* v. *Employers Liability Assurance Corp.*, 111 N. Y. S. 76. In that case an employer in New York took out fidelity insurance in that State on its employees, and one of its employees, a salesman-collector, misappropriated money in Connecticut, and the question was whether the laws of Connecticut or the laws of New York determined whether the act was within the category of those insured against, and it was held that the laws of New York determined.

It is the commission of the act of dishonesty that the provision of the bond, "in any position, anywhere," relates to. It will be seen by reference to the bond (R. 11), that the undertaking therein is "to pay * * * pecuniary loss * * * sustained * * * through the fraud * * * committed * * * in any position, anywhere." That provision, therefore, manifestly does not refer to money or property which might be lost through fraud, etc., as the Mississippi Court seemed to think.

Aware of the fact that the "interest" insured was necessarily in Tennessee at the time of the making of the contract, the Mississippi Court brought in the fact of Appellee and its officers' subsequent removal to Mississippi, as necessary to take the interest into Mississippi. But as has been seen from the authorities cited, those facts did not change the contract and make the interest one in Mississippi

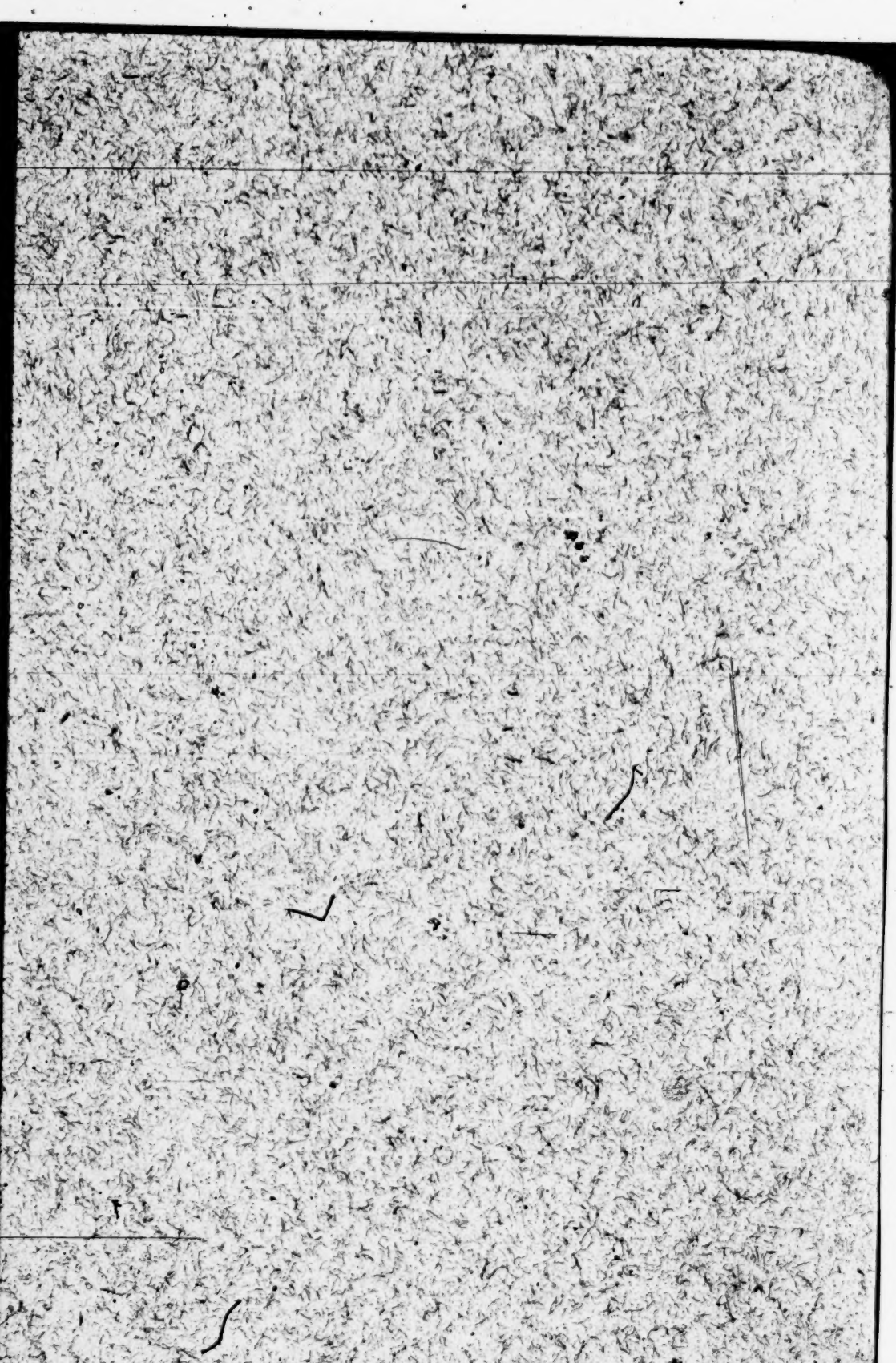
which warranted its being considered a Mississippi contract and subject to the laws of that State.

## Conclusion.

Wherefore, it is respectfully submitted on behalf of Appellant that the decision of the Supreme Court of Mississippi is erroneous and should be reversed with directions.

WM. M. HALL,
*Counsel for Appellant.*

(4542-C)



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DEC 13

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1933**

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# No. 650

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HARTFORD ACCIDENT AND INDEMNITY COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLANTS,

*vs.*

DELTA & PINE LAND COMPANY.

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

---

## STATEMENT OPPOSING JURISDICTION.

---

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# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1933**

# No. 650

HARTFORD ACCIDENT AND INDEMNITY COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLANTS,

*vs.*

DELTA & PINE LAND COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

## STATEMENT OF APPELLEE IN OPPOSITION TO JURISDICTION UNDER RULE 12, PARAGRAPH 3.

### No Jurisdiction in This Court.

Appellant, a Connecticut corporation qualified to do business in Mississippi, under the Insurance chapter of Code of 1930, Section 5129, *et seq.*

"Section 5129.—All indemnity * * * companies * * * whether domestic or foreign, transacting or to be admitted to transact the business of insurance in

this state, are insurance companies within the meaning of this chapter, and shall be subject to inspection and supervision of the commissioner."

Section 5131, construed by the Mississippi Court herein, provides, among other things, "all contracts of insurance on property, lives or interests in this state shall be deemed to be made herein."

In *Stuyvesant Insurance Company* v. *Smith Motor Sales Company*, 135 Miss. (1924) 585, 99 So. 575, where the contract was made in Tennessee, Mr. Justice Anderson said:

> "Was the cause of action barred by virtue of the following provision in the policy?
>
> "'Nor unless (suit) commenced within twelve months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the state wherein this policy is issued then, and in that event, no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state.'
>
> "This suit was brought here more than twelve months after the loss. Appellant contends that this policy was a Tennessee contract and that, under the laws of Tennessee, the stipulation in the policy above copied is valid and binding, and that therefore, by comity, the courts of this state must interpret and enforce said contract according to the laws of the state of Tennessee.
>
> "Under section 2563, Code of 1906 (section 5028, Hemingway's Code), all contracts of insurance on property situated in this state, regardless of where the contracts were made, are declared to be Mississippi contracts, and are construed according to the laws of this state, regardless of any provisions in the contracts to the contrary. *Fidelity Insurance Co.* v. *Miazza*, 93 Miss. 18, 43 South. 817, 136 Am. St. Rep. 534.
>
> "Under section 3127, Code of 1906 (section 2491, Hemingway's Code), providing that all stipulations in contracts changing the period within which suits must

be brought under our statutes of limitations shall be null and void, the stipulation in question has no binding force. *Standard Insurance Co.* v. *Broom*, 111 Miss. 409, 71 South 653."

Appellant, a Connecticut Corporation, issued a policy, made an exhibit to the declaration, to the Delta & Pine Land Company of Mississippi, a Mississippi corporation, and/or Delta Farm Company, and/or Empire Plantation Company, whose domiciles and businesses nowhere herein appear. By the policy, within sixty (60) days after satisfactory proof, appellant, a Connecticut corporation, promised to pay appellee (without specification where) such pecuniary loss by reason of fraud of its employees "in any position, anywhere" and in the policy under the schedule appended, appeared the name of H. H. Harris, Treasurer; location, Memphis, Tennessee; amount $25,000; premium, $75.00, whose defalcations "occurred in the First Judicial District of Bolivar County, Mississippi, and that by reason of the aforesaid act * * * plaintiff has sustained pecuniary loss in the sum of $2703.79."

Defendant pleaded in confession, that plaintiff "was doing business in the State of Tennessee, and had their principal office in Memphis * * * and defendant was also * * * doing business in the State of Tennessee, and had an agency at Memphis * * *; and plaintiff through its said office at Memphis * * * applied to defendant, through its agency at Memphis * * * for said bond * * * constituting said contract of suretyship and defendant, through its said agency at Memphis, executed and delivered the same to plaintiff at its said office at Memphis * * * and said contract is a Tennessee contract and is governed by the laws of Tennessee" and full faith and credit must be given to decisions therein, observation had of the contract clause and the 14th Amend-

ment of the Federal Constitution, whereunder, by reason of the provisions as to notice, which was not given within fifteen months, defendant is relieved of responsibility.

Appellee demurred, sustained, judgment final, affirmed by the State Supreme Court on a non-Federal ground, as we contend.

The contract is silent as to the place of performance. The record is silent as to what was done by this Mississippi corporation and its co-insurers in Mississippi, or what was the extent of the business done by any of them in Tennessee. The place of payment is not stipulated. The Mississippi Court held, in the following two prior decisions, *Fidelity Mutual Insurance Company* v. *Miazza* (1908), 93 Miss. 18, 46 So. 817; *Stuyvesant Insurance Co.* v. *Smith Motor Sales Co.* (1924), 135 Miss. 585, 99 So. 575, that the indemnity policy issued by this Connecticut corporation to a Mississippi corporation was, as to a defalcation occurring in Mississippi, governed by the statutes of Mississippi, situsing therein all contracts of insurance covering property, lives or interests in this state.

> "A contract insuring property in this state necessarily involves the doing of business in this State, and hence is subject to the laws of this state."

*Cowan* v. *London Assurance*, 73 Miss. 321, 19 So. 298; *Moses* v. *State*, 65 Miss. 56, 3 So. 140; *Lemonius* v. *Mayer*, 71 Miss. 514, 14 So. 33; *Rose* v. *Kimberly*, 27 L. R. A. 557, 62 N. W. 526, 89 Wis. 545, especially insofar as the question of limitation thereasto may be applicable. *Swing* v. *Cameron*, 145 Mich. 175, 108 N. W. 506, 9 L. R. A. (N. S.) 417, and note page 420, summarizing many cases directly in line. That the Mississippi Court was fully conscious of the 14th Amendment is demonstrated by the limitation of the Cowan case by *Swing* v. *Brister*, 87 Miss. 516, 40 So. 146, when thereasto it said that a prohibition to sue for

a premium would be a violation of the 14th Amendment of the Constitution of the United States. The controversy in the Brister case centered about an assessment made in Ohio June 11, 1901, and the Chapter on Insurance was not enacted in Mississippi until March 5, 1902. Mississippi Acts 1902, 62-96. So that the Brister Case in no wise as to the situs of that insured, interfered with the rule adopted in the Cowan case and restated in this case in direct accord with the authorities collated in the note in 9 L. R. A. (N. S.) 420. Compare *American Fire Ins. Co.* v. *King Lumber Co.* (Fla.), 77 So. 168; *Galliher* v. *Life Ins. Co.* (Ala.), 43 So. 833.

Defendant averred that Article 4, Section 1; Article 1, Section 10; and First Section of the 14th Amendment were contravened. Thereasto, we submit:

(1) Applicability, Not Validity, of Section 5131 Involved; Hence Certiorari, Not Appeal, Appropriate.

The sole issue herein centered upon whether Section 5131 applied to business done by reason of the laws covering defalcations anywhere, and this defalcation being in Mississippi, did it thereby become a defalcation under the terms of the policy, whereasto by reason of its location, the Mississippi statute was construed as applicable.

Compare *Stuyvesant Ins. Co.* v. *Smith Motor Sales, supra.*

That being the question, Certiorari, not appeal, appropriate. *Victor Westling* v. *United States*, 77 L. Ed. 969, 288 U. S. 591; *Bradford Electric Light Co.* v. *Clapper*, 284 U. S. 221, 76 L. Ed. 254; *Public Service Commission* v. *Batesville Telephone Co.*, 284 U. S. 6, 76 L. Ed. 135; *Baxter* v. *Continental Casualty Co.*, 284 U. S. 578, 76 L. Ed. 502; but see *Aetna Life Insurance Co.* v. *Dunken*, 266 U. S. 389, 69 L. Ed. 342; *Home Ins. Co.* v. *Dick*, 281 U. S. 379, 74 L. Ed.

926. Compare *Phila. & R. C. & I. Co. v. Gilbert*, 245 U. S. 162; *Ireland v. Woods*, 246 U. S. 323, 62 L. Ed. 745; *Stadelman v. Miner*, 246 U. S. 544, 62 L. Ed. 875; *Northern Pac. R. Co. v. Solum*, 119 U. S. 561, 30 L. Ed. 513.

With deference, that solely in issue here is the applicability of this statute to the occurrences, all of which is situsedin Mississippi and thereasto the decision of Mississippi is conclusive.

*Insurance Co. v. Cravens*, 178 U. S. 395, 44 L. Ed. 1172.

(2) (*a*) Palpably No Invasion of the Contract Clause, Because There Was No Subsequent State Statute. *Central Land Co. v. Laidley*, 159 U. S. 103, 112, 40 L. Ed. 91, 94; *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 451, 68 L. Ed. 382, 385.

(*b*) No Violation of the Full Faith and Credit Clause, Because Mississippi's Laws Were Made Applicable Only to That Occurring Actually Within Mississippi, Whereasto Tennessee Had No Authority.

1. This court bound by local decision. *New York Life Insurance Co. v. Cravens*, 178 U. S. 395, 44 L. Ed. 1122, holds "if we are bound by the interpretation of a statute, we need not review the reasoning by which that interpretation was reached. And we think we are bound by it."

2. Place of performance, in absence of express contract to the contrary may admeasure legal rights. *London Assurance v. Companía, etc.*, 167 U. S. 149, 42 L. Ed. 113; *Farmers, etc. Bank v. Federal Reserve Bank*, 262 U. S. 660, 67 L. Ed. 1164; *Rose v. Kimberly, supra; Galliher v. Life Ins. Co., supra.* And thereunder, as to the matter of insurance, Mississippi had almost plenary jurisdiction. *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011; *O'Gormon v. Hartford Fire Insurance Co.*, 282 U. S.

251, 75 L. Ed. 324; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden*, 284 U. S. 151, 76 L. Ed. 214.

3. As to the performance in Mississippi under repeated decisions, it may be controlled by Mississippi law. 13 C. J. 251, and the full faith and credit clause did not extra territorially expand into Mississippi Tennessee's power to subvert that which was by the Legislature in Mississippi done, as to the performance in Mississippi. *Bonaparte* v. *Tax Court*, 104 U. S. 592, 26 L. Ed. 845; *Olmsted* v. *Olmsted*, 216 U. S. 386, 391, 54 L. Ed. 530, 532; *Tennessee, etc. Company* v. *George*, 33 U. S. 354, 58 L. Ed. 997; *Atchison, etc. Ry. Co.* v. *Sowers*, 213 U. S. 66, 53 L. Ed. 700.

4. Tennessee's power over its internal affairs are in no way questioned, but only the contract construed, such construction not necessitating invalidation does not bring jurisdiction here. *Grand Gulf, etc. Co.* v. *Marshall*, 12 How. 165, 13 L. Ed. 938. *Glenn* v. *Goth*, 147 U. S. 369, 37 L. Ed. 206; *L. & N. R. R. Co.* v. *Melton*, 218 U. S. 51, 54 L. Ed. 927.

Counsel cite two cases:

(A) *Home Insurance Company* v. *Dick*, 281 U. S. 397, 74 L. Ed. 926, whereasto we submit:

The opinion therein said:

> "We need not consider how far the State may go in imposing restrictions on the conduct of its own residents and of foreign corporations which have received permission to do business within its borders * * *."

The Texas court sought to integrate a Texas statute into a Mexican contract, to be performed in Mexico and this court properly held "it may not validly affect contracts which are neither made nor are to be performed in Texas."

But this contract has to do with insurance in Mississippi between a Connecticut corporation and a Mississippi cor-

poration and two other corporations, whose domicile is Mississippi, we assume, appellant not pleading the contrary. The averment as to the appellee is that its principal office was in Memphis. What was thereat done does not appear. Whether premiums were there paid, losses there adjusted, and the line of demarcation between what was in Mississippi and what was in Tennessee are by the plea left, to say the least of it, uncertain.

The rule as to Mississippi law is integrated into all contracts covering property in Mississippi, especially when made by residents of Mississippi with insurance companies authorized locally to do business, having been well settled since *Moses* v. *State*, 65 Miss. (1887) 60, 3 So. 140; *Cowan* v. *London Assurance*, 73 Miss. 321 (1895), 19 So. 298. That such a provision in a Mississippi policy was absolutely void was settled thoroughly in Mississippi. *Standard Accident Ins. Co.* v. *Broom*, 111 Miss. 409, 71 So. 653; *General Accident, etc. Co.* v. *Walker*, 99 Miss. 404, 55 So. 51; *Dodson* v. *Western Union Tel. Co.*, 97 Miss. 104, 52 So. 693; *National Casualty Co.* v. *Mitchell*, 162 Miss. 197, 138 So. 808.

With this uncertainty, Judge McGowen in his opinion was precisely correct in declaring, "Where the contract is silent, the place of making the contract is presumed to be the place of performance in this case the payment by the indemnity company of a default of any of the employees of the appellee. See *Jones* v. *Perkins*, 29 Miss. 139, 64 Am. Dec. 136." As stated by Judge McGowen, this policy covered a defalcation of Harris, "in any position, anywhere" and when he, as an employee, embezzled in Mississippi, its interest in Mississippi was thereunder indemnified by appellant in Mississipi, as a Mississippi contract, because it then affected lives, property and interest in Mississippi. "The contract of indemnity * * *, permitted the removal of the employees to any place and indemnified

against loss wherever it occurred, there being an interest of the appellee indemnified, and the appellee having removed to Mississippi, and defalcation occurring herein * * *", the contract became an indemnity contract against loss of interest of appellee in Mississippi, especially under the Mississippi cases quoted, *supra*, under which Mississippi has meticulously applied to all transactions in her borders the rule as to limitation prescribed in her statutes and has not permitted rights as to them to be divested by a foreign state through extraterritorial legislation.

(B) *Aetna Life Insurance Co.* v. *Dunken*, 266 U. S. 389, 68 L. Ed. 342, is likewise not controlling for there "the Texas statute was incapable of being constitutionally applied to it, since the effect of such application would be to regulate business outside the State of Texas, and control contracts made by citizens of other states. * * *".

Compare quotation from the Dick case, *supra*, which being decided under common law, of necessity demonstrated that the Dunken case was not controlling thereasto.

As at the date of this contract, under settled judicial decisions of Mississippi, wherewith appellant was familiar, all interest so insured had been situsedin Mississippi, and thereasto Mississippi had made her statutes of limitation controlling, eliminating these short time provisions for the forfeiture of substantial rights, and that here at issue is solely whether this statute applied to this contract as to business done in Mississippi when the contract was between a citizen of Mississippi and a citizen of Connecticut as to interests located within Mississippi, whereover Mississippi was sovereign.

Obviously, the insurance company thought so for in its policy was inserted the provisions as to this limitation "in case such limitation be void under the law of the place

governing construction hereof, then within the shortest period of limitation permitted by such law." Had the Tennessee law alone been applicable, such a provision would have been inappropriate, but with the Mississippi law applicable it was essential.

In the Dunken case, all related back to the original policy which was admeasured in its obligation by the law of the State of Tennessee. Herein the major portion was as to business being done in Mississippi as to interests there possessed by appellant which operates mammoth farming interests at Scott, and being thus tied to the land—we assume only that which we may by construing the pleading against the pleader—Mississippi regulated that which it was privileged so to do, because done within her borders.

(C) As to the 14th Amendment, we reiterate to save prolixity that observed under (B), *supra*.

Under *Pennsylvania Fire Insurance Co.* v. *Gold*, 243 U. S. 593, 61 L. Ed. 610, this Court said:

> "But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts and such interpretation does not involve a constitutional question."

When, therefore, appellant came into Mississippi, did business in Mississippi, as permitted by the laws of Mississippi, under the sovereignty of Mississippi, it could not complain that it was deprived of its property without due process when in Mississippi but applied to it the same rule it had announced many years before, that all policies covering interests in Mississippi, irrespective of where written, should be construed in accordance with the law of Mississippi as to limitations when sued upon in the Mississippi

courts, and obviously this was correct where the policy was to a Mississippi Corporation, created by Mississippi, operating in Mississippi under Mississippi's laws, with a Connecticut corporation which had qualified to do business in Mississippi in accordance with Mississippi's laws.

*Hooper* v. *California*, 155 U. S. 648, 39 L. Ed. 297.

Wherefore, it is respectfully submitted that this Court has no jurisdiction hereof, for these reasons and for the reasons admirably set forth in the opinion of the Supreme Court, and this appeal should be dismissed, being lacking in substantial Federal Question, and further not the appropriate right to be exercised in bringing the cause to this Court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

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No. 650

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HARTFORD ACCIDENT & INDEMNITY COMPANY ET AL.

*vs.*

DELTA & PINE LAND COMPANY.

---

# BRIEF ON MOTION TO DISMISS OR AFFIRM AND ON THE MERITS.

---

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| "There being 'an interest in Mississippi' with respect to which the contract was made, if there was in truth such an interest; did not warrant the application of the Mississippi statutes to the contract, because the parties had the right to contract with respect thereto in Tennessee and the laws of that State entered into the contract and gave them rights which they and each of them were protected in by the due process clause and the full faith and credit clause of the Constitution." | |
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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1933**

# No. 650

HARTFORD ACCIDENT & INDEMNITY COMPANY

ET AL.,

*vs.*

DELTA & PINE LAND COMPANY.

## BRIEF ON MOTION TO DISMISS OR AFFIRM AND ON THE MERITS.

### Preliminary Statement.

Appellee reiterates its statements opposing jurisdiction, asks that same be considered as a Motion to Dismiss or Affirm, and that the cause be dismissed for want of a substantial Federal question, as therein contended; or, if not, affirmed; and having so thus done, this motion having been continued to the hearing on the merits, now here submits that the cause be affirmed.

### Appellee's Statement of the Case.

Appellee prefers to state the case as an entirety as presented:

Delta & Pine Land Company, herein called Appellee and/or Land Company, a Mississippi Corporation, under

the declaration, "having its principal place of business in the town of Scott * * * Mississippi * * * complain of the Hartford Accident & Indemnity Company, herein called Indemnity Company and/or appellant, a corporation duly chartered under the laws of the State of Connecticut and having its principal place of business in the City of Hartford, Connecticut, and qualified and authorized to do business in the State of Mississippi by complying with the laws of the State of Mississippi * * *".

About January 1, 1928, Land Company applied to Indemnity Company for a fidelity bond, which Indemnity Company delivered to Land Company through its agency in Memphis, whereunder Indemnity Company promised to pay to Land Company, within sixty days after satisfactory proof of loss, such pecuniary loss as Land Company (Tr., 1) should sustain through the fraud of any employe "in any position, anywhere during the period commencing with the respective dates set opposite the names of the employees in such schedule * * *". Copy is Exhibit "A" to declaration.

The location (Tr., 13) of eight of the officials bonded, including the President, Vice President, Treasurer, Secretary, Assistant Treasurer, Bookkeeper, Clerk and Purchasing Agent was given as "Location, Memphis, Tenn." The residue, twenty-one in number, were given as within Mississippi. As admitted in the brief for appellant, "appellee moved its office force from Memphis to Mississippi, and its Treasurer moved with it to Mississippi * * *". Appellant conceded that "that was inferable from the allegations in the declaration."

The Treasurer, H. H. Harris, after having moved, was guilty of fraud in Bolivar County, Mississippi, by reason whereof plaintiff was damaged in the sum of $2,703.79 (Tr., 9).

Appellee gave written notice of the default to Indemnity Company at its home office, with affirmative proofs of loss, and the suit is brought before the expiration of twelve months after the filing thereof. Exhibit "A" (Tr., 11), shows the home office of appellant, Hartford, and as to the appellee thus: "Delta and Pine Land Company of Mississippi and/or Delta Farm Company and/or Empire Plantation Company (as interest may appear) * * *."

Upon discovery of any dishonest act, "Land Company was to give immediate written notice thereof to the Surety Company at its home office."

Special plea in bar was filed by appellant averring "before and at the date of the contract (appellee) was doing business in the State of Tennessee and at its principal office at Memphis * * * and defendant was also then, as it is now, doing business in the State of Tennessee and had an agency at Memphis * * * and plaintiff through its said office at Memphis * * * applied to defendant through its agency at Memphis * * * for said bond, constituting said contract * * * and defendant through its agency at Memphis executed and delivered the same to plaintiff at its said office at Memphis, and said contract is a Tennessee contract and is governed by the laws of Tennessee, and full faith and credit must be given thereto in courts" of Mississippi, it having been decided in Tennessee that such conditions or limitations as to time are valid, and if not made within fifteen months after the termination of the suretyship for the defaulting employee, the rights under the contract terminated. The employee's relationship ceased December 31, 1929, as plaintiff did not make claim upon defendant until June 22, 1931, the same was barred (Tr., 18, 19).

Demurrer was interposed, averring the laws of Mississippi applicable, which was sustained. Appellant declined to plead further. Judgment final was rendered (Tr., 21).

On appeal to the Supreme Court, the judgment was affirmed, the Court stating:

> "But clearly under Section 5131, Code 1930, defining insurance, this indemnity bond is a contract of insurance within the purview of that statute; and, further, it being expressly provided therein that all contracts of insurance on property, lives or interests in this state shall be deemed to be made therein, in our judgment, makes the contract herein under review a Mississippi contract and solvable under the laws of this state. The contract here provided or stipulated that the appellee should be indemnified from loss by the defalcation of H. H. Harris in any position anywhere, and when he, the employee and the insured herein, removed to Mississippi and there defaulted, so far as the appellee is concerned its interest was insured or indemnified by the appellant in Mississippi, and, under the provision quoted from the above statute, became operative, and this state is obligated to enforce it, as a Mississippi contract, although it contained all the elements necessary to make it a Tennessee contract, but for the statute.
>
> "This court is committed to the proposition that if lives or property is insured in this state, although the contract be made in another state, the contract is solvable under the laws of our own state. *Fidelity Mutual Insurance Co.* v. *Miazza*, 93 Miss. 18, 46 So. 817; *Stuyvesant Ins. Co.* v. *Smith Motor Sales Co.*, 135 Miss. 585, 99 So. 575. The contract of indemnity in the case at bar, in our opinion, permitted the removal of employees to any place and indemnified against loss wheresoever it occurred. There being an interest of the appellee indemnified, and the employee having removed to Mississippi and his defalcation having occurred therein, whereby the appellee sustained a loss, and under the terms of the contract no notice of said removal being required, the contract became an indemnity contract against loss of interest of the appellee in this state. When the statute declares that such a contract shall be deemed to be made in this state, it

means that the conflict of law between the two states is eliminated, and thereby under the above authorities, a contract for fifteen months' notice was a limitation of the action enforceable as such in this state."

Suggestion of Error was filed; was overruled (Tr., 29, 30), and regular appellate proceedings had hereto.

## Mississippi Statutes Involved.

Section 2294, Mississippi Code 1930, in effect since 1906:

> "*Period of limitations not to be changed by contract.*—The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants."

Construed in *Dodson* v. *Western Union* (1910), 97 Miss. 104, 52 So. 693; *Standard, etc. Ins. Co.* v. *Broom* (1916), 111 Miss. 409, 71 So. 653; *Sovereign Camp* v. *Miller* (1921), 125 Miss. 502, 87 So. 892; *Stuyvesant Ins. Co.* v. *Smith Motor Sales Co.*, 135 Miss. (1924) 585, 99 So. 575; *National Casualty Co.* v. *Mitchell* (1933), 162 Miss. 197, 138 So. 808; *Berry* v. *Lamar Life Ins. Co.* (1933), 165 Miss. 405, 145 So. 887; *Mutual Life Ins. Co.* v. *Hebron* (1933), 166 Miss. 145, 146 So. 445.

Section 5131, Mississippi Code 1930, in effect before 1906:

> "*What is insurance—situs of contract.*—A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction, loss or injury of something in which the assured or other party has an interest, as an in-

demnity therefor; and it shall be unlawful for any company to make any contract of insurance upon, or concerning any property or interest or lives in this state, or with any resident thereof; or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance unless and except as authorized under the provisions of this chapter. All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein."

Construed in *Fidelity & Ins. Co.* v. *Miazza* (1908), 93 Miss. 18, 46 So. 817; *Stuyvesant Ins. Co.* v. *Smith Motor Sales Co.* (1924), 135 Miss. 585, 99 So. 575.

Appellant makes two points:

POINT I.

**"There being 'an interest in Mississippi' with respect to which the contract was made, if there was in truth such an interest, did not warrant the application of the Mississippi statutes to the contract, because the parties had the right to contract with respect thereto in Tennessee and the laws of that State entered into the contract and gave them rights which they and each of them were protected in by the due process clause and the full faith and credit clause of the Constitution",**

**Whereto, we answer:**

A. *Sufficient factual background not set up to overcome presumption of constitutional validity of Mississippi's statute.*

Appellant substantially admits liability, but seeks to forfeit appellee's rights through limitation.

Under Mississippi practice, the agreement, being in writing and exhibited, controlled the averments of the pleader as to the rights thereunder arising. *Hanover National*

*Bank* v. *Montgomery*, 79 Miss. 443, 30 So. 635. Construing the pleadings most strongly against the pleader, the policy and the riders give uniformly the appellant "as Hartford Accident & Indemnity Company, Hartford, Connecticut," whereat proof of loss under oath is to be made and wherefrom payment was to originate. Appellant was likewise qualified to do business and did business in Mississippi wherein it had become obligated to conform to Mississippi's laws and had only "an agency at Memphis," through which application was made and whereby the policy was delivered.

At the date of the default, appellee's entire operations were centered at its Mississippi domicil, Scott, wherefrom it had sojourned in the times of prosperity, to establish "its principal office at Memphis," but the time whereat this was done, the duration of the establishment, the extent of that thereunder to be accomplished are in no way averred; assuming, under the pleadings, as we may do, appellant's operation was of a Mississippi cotton plantation approximating 10,000 acres or more, and this was its only business, and that it carried on such plantation business in Mississippi. There Harris, its treasurer, had to account and all debts due by him to it were there solvable and his tort liability was admeasured by Mississippi's laws.

*Ormsby* v. *Chase*, 78 L. Ed. 231; *Young* v. *Masci*, 289 U. S. 258, 77 L. Ed. 1161; *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 154, 76 L. Ed. 1026, 1032.

As to the criminal aspect of Harris' act, no State other than Mississippi would have jurisdiction, *Wisconsin* v. *Insurance Co.*, 127 U. S. 265, 32 L. Ed. 239.

Harris' responsibility there accruing, whereasto appellee was to be indemnified, had a fixed Mississippi situs, *Fidelity Mutual Ins. Co.* v. *Miazza*, 93 Miss. 18, 46 So. 817, *Stuyvesant Ins. Co.* v. *Smith Motor Sales Co.*, 135 Miss. 585, 99 So. 575, and the decisions of Mississippi's Court as to her

statutes are here controlling. *Hartford Accident & Indemnity Co.* v. *N. O. Nelson Mfg. Co.*, 78 L. Ed. 470. The decisions of this Court situs such an indemnity agreement in Mississippi.

*The Kensington*, 183 U. S. 263, 46 L. Ed. 192; *Pritchard* v. *Norton*, 106 U. S. 124, 27 L. Ed. 108, citing *Boyle* v. *Zacharie*, 6 Pet., 635, *Bell* v. *Bruen*, 1 How., 169, and declaring:

> "We do not hesitate, therefore, to decide that the bond of indemnity sued on was entered into with a view to the law of Louisiana as the place for the fulfillment of its obligation; and that the question of its validity, as depending on the character and sufficiency of the consideration, should be determined by the law of Louisiana, and not that of New York."

This was, therefore, a contract of indemnity whereasto Mississippi's laws admeasured responsibility of Harris to appellee. Appellee was to be held harmless and the provision of the policy (Tr., 12), "in case such limitation be void under the law of the place governing the construction hereof, then within the shortest period of limitation permitted by such law," by Mississippi law, Code Sections 2194-5130 as construed by its Supreme Court, becomes a proper provision; otherwise such provision would have no place therein, the Tennessee law being that the 15 months limitation was valid. Compare *Union Trust Co.* v. *Grossman*, 245 U. S. 418, 62 L. Ed. 372.

The law of the domicil governs the status of the person. *Lamar* v. *Micou*, 112 U. S. 452, 28 L. Ed. 751. Appellant's contention is that a Mississippi corporation may, by a temporary sojourn in Tennessee integrate Tennessee's laws into its operations so effectively as to set at naught the public policy of Mississippi. *The Kensington*, 183 U. S. 269, 46 L. Ed. 193; 2 *Cooley's Briefs on Insurance*, 2nd Ed., 1035.

In *Black* v. *Zacharie,* 3 How. 483, 11 L. Ed. 690, the law of the owner's domicil determined the validity of the disposition of personalty. All rights as to personalty may be governed by the law of the domicil. *Dixon's Executors* v. *Ramsay's Executors,* 3 Cranch 317, 2 L. Ed. 453; *St. Louis* v. *Wiggins Ferry Co.,* 11 Wall. 423, 20 L. Ed. 192. In modern times actual situs may confer sovereignty thereover. *Pullman Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 35 L. Ed. 613; *Frick* v. *Pennsylvania,* 268 U. S. 473, 69 L. Ed. 1058, declaring:

> "The laws of other states have no bearing save as that State expressly or tacitly adopts them—their bearing then being attributable to such adoption, and not to any force of their own."

*Farmers Loan & T. Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586, 74 L. Ed. 1056; 79 A. L. R. 346, note; 86 A. L. R. 745, note, 761, note.

The dominion of a State over personalty there situated is complete. *Green* v. *Van Buskirk,* 7 Wall. 139, 19 L. Ed. 109; *Tayloe* v. *Merchants' Fire Ins. Co.,* 9 How. 390, 13 L. Ed. 187.

Under Mississippi Code 1930, Section 1401, in effect for many years, all personal property situated in Mississippi descends according to its laws regardless of all marital rights and notwithstanding the domicil of the deceased owner.

*Ewing* v. *Warren,* 144 Miss. 233, 109 So. 601; *Richardson* v. *Neblett,* 122 Miss. 723, 84 So. 695, 10 A. L. R. 272; *Neblett* v. *Neblett,* 112 Miss. 550, 72 So. 575; *Jahier* v. *Roscoe,* 62 Miss. 699; *Wilson* v. *Cox,* 49 Miss. 538.

At the time of the execution of the bond there were twice as many employes, whose fidelity was guaranteed, located in Mississippi as in Tennessee. The bond only refers to location for purposes of identification and not as a con-

tractual situs whereat employes shall solely work, for thereunder their acts were covered "in any position, anywhere." (Tr., 11.)

The nature of Harris' duties would carry him to Mississippi where the farm was, and there is no covenant that Harris remain in Tennessee or his duties be there confined. All that Mississippi has done is to make applicable to that portion of the business affecting Mississippi's right and Mississippi property, the public policy of Mississippi. Compare *Terrace* v. *Thompson*, 263 U. S. 218, 68 L. Ed. 276. This was held constitutional in *American Fire Insurance Co.* v. *King Lumber & Mfg. Co.*, 250 U. S. 11, 63 L. Ed. 815, where the Court said:

> "The Florida statute does not attempt to invade Pennsylvania and exercise control there. It stays strictly at home in this record, and regulates the Insurance Company when it comes to the State to do business with the citizens of the State and their property."

Appellant well knew the business of appellee and its situs, and the holdings of Mississippi's Court. Being an Insurance Company, it did not disregard the possibility of this imposition of liability in accordance with Mississippi's decisions, but in fixing its premiums undoubtedly exacted compensation for this potentiality, and so having done, may not therefrom profit. *Lumber Co.* v. *Page*, 109 Conn. 253, 146 Atl. 293; *Hartford etc. Co.* v. *N. O. Nelson Mfg. Co.*, 78 L. Ed. 470.

These statutes with these judicial decisions (which by reenactment had become integrated thereinto, *Gully* v. *International Co.*, 165 Miss. 86, 145 So. 907, *White* v. *Miller*, 160 Miss. 734, 130 So. 146), admonished appellant of Mississippi's laws, wherewith compliance must be had, and if appellant misinterpreted, no constitutional question is

raised. *Pennsylvania, etc. Co.* v. *Gold Issue, etc. Co.*, 243 U. S. 93, 61 L. Ed. 610. These statutes of Mississippi, with these judicial decisions, became a part of appellee's protection "as fully as if they had been expressly referred to and incorporated in its terms." *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 660, 67 L. Ed. 1181.

In *Washington* v. *Superior Court*, 289 U. S. 363, 77 L. Ed. 1259, the Court said:

> "It has repeatedly been said that qualification of a foreign corporation in accordance with the statutes permitting its entry into the State constitutes an assent on its part to all the reasonable conditions imposed. (Citing cases.) It is true that the corporation's entry may not be conditioned upon surrender of constitutional rights, as was attempted in the cases on which the appellant relies. (Citing cases.) And for this reason a State may not exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admissions. *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678."

It is not unreasonable for the State under such facts to secure to its citizens a remedy in the domestic forum, *Pennsylvania L. M. F. Ins. Co.* v. *Meyer*, 197 U. S. 415, 49 L. Ed. 815, and being an insurance company, the measure of Mississippi's rights are admeasured by *Hartford, etc. Co.* v. *Nelson*, 78 L. Ed. 470; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011; *O'Gorman* v. *Hartford F. Ins. Co.*, 282 U. S. 251, 75 L. Ed. 324, 72 A. L. R. 1163; *Tyson* v. *Banton*, 273 U. S. 418, 434, 71 L. Ed. 718, 724; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden*, 284 U. S. 151, 76 L. Ed. 214; *Herbring* v. *Lee*, 280 U. S. 111, 74 L. Ed. 217. We invoke the presumption of validity vouchsafed in *Hardware Dealers, etc.* v. *Glidden*, 284 U. S. 151, 76 L. Ed. 214, *supra*. Facts alone are admitted, not conclusions, and under the facts set up in defendant's plea

to appellee's declaration, there is naught adequate to strike down Mississippi's statute as adjudicated by Mississippi's Court, wherefrom this appeal is taken; even if appellant be not estopped by premium fixation from raising question.

B. *Appellee's domicil being in Mississippi, her laws should admeasure the rights herein as to that within her jurisdiction.*

Harris being bound to account in Mississippi for that by him there received, to appellee, the rights under this contract should be admeasured as to Mississippi property within Mississippi's territory by Mississippi's laws when appellee is a Mississippi corporation that may not therefrom migrate, and when, as to this point, Mississippi has a definite public policy.

Compare *Bothwell* v. *Buckbee, Mears & Co.*, 275 U. S. 278, 72 L. Ed. 280; *Pennsylvania Lumbermen's Mut. F. Ins. Co.* v. *Meyer*, 197 U. S. 407, 416, 49 L. Ed. 810, 815:

> "The contract did not specify the place where payment for the loss should be made, so that under the common rule the insurer would be required to make the payment in Minnesota, the domicil of the insured."

No performance whatsoever was being had of any portion of this contract, wherefor recovery is herein sought, within Tennessee, and the place of performance may well be made the basis of the law to control by the Sovereignty having jurisdiction thereover.

C. *Regulating only that done in Mississippi in accordance with Mississippi's public policy, appellant may not, having entered Mississippi, thereof complain.*

Compare *Washington v. Superior Court, supra.*

In *Pennsylvania, etc. Insurance Co.* v. *Meyer*, 197 U. S. 415, 49 L. Ed. 815, a contract was made in Philadelphia

covering property in New York, and thereof Mr. Justice Peckham said:

> "Although the contract may have been a Pennsylvania contract, yet it does not follow that all its provisions were to be carried out in that state. The policy of insurance was * * * upon real estate within the State of New York * * *. After the defendant and the owner had either agreed upon the amount of loss, or the same had been estimated and determined upon by the appraisers, as provided for in the policy, the defendant, by the terms of that instrument, promised to pay to the owner the amount thus arrived at, within sixty days. The policy does not state in so many words where such payment is to be made, but it is a general rule that, in the absence of any such provision, or of any language from which a different inference may be inferred, the right of the creditor to demand payment at his own domicil exists, and it is the duty of the debtor to pay his debt to the creditor in that way. It is stated in the opinion of this Court, by Mr. Justice Field, in *State Tax on Foreign-held Bonds (Cleveland, P. & A. R. Co.* v. *Pennsylvania,* 15 Wall. 300, 320, 21 L. Ed. 179, 187): 'All the property there can be in the nature of things in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicil, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression, could add anything to its obvious truth, which is recognized upon its simple statement.'"

And this Court then held that although that was a Pennsylvania contract, yet the cause of action arose in New York, and therefor thus arising suit might thus be brought in New York; and that at issue is, was Mississippi impotent to apply its law to a cause of action so thus arising.

As was further said in *Pennsylvania L. M. F. Ins. Co.* v. *Meyer, supra:*

> "It is not unreasonable for the state, under such facts, to endeavor to secure to its citizens a remedy in the domestic forum upon this very important class of contracts."

Compare *Lafayette Ins. Co.* v. *French*, 18 How. 404, 407, 15 L. Ed. 451, 452. It was an express part of this contract that the provision here relied on by appellant as controlling might be void, and if void, there was an express contract "that the shortest period of limitation permitted by such law" should control. (Tr., 12.) Thereof appellant, wisely, attempts no explanation, because it is perfectly obvious that that which has occurred was within the contemplation of the parties and was by the policy specifically contracted as to.

The State has almost plenary power as to insurance contracts, and this Court should, except in the clearest cases, credit the Legislature with power to act.

It may require a deposit of securities (*Paul* v. *Virginia*, 8 Wallace (U. S. 1869) 168, 19 L. Ed. 357); may force them to comply with the State laws in detail (*Hooper* v. *People*, 155 U. S. 648, 39 L. Ed. 297); may compel them to settle on the basis of the value of the policy rather than on the actual loss (*Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 43 L. Ed. 552); may make policies valid even if erroneous answers were given, if not fraudulently given (*John Hancock Life Ins. Co.* v. *Warren*, 181 U. S. 73, 45 L. Ed. 755; *Northwestern Mutual Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 51 L. Ed. 168); can regulate the forfeiture of policies for the non-payment of premiums (*N. Y. Life Ins. Co.* v. *Cramer*, 178 U. S. 389, 44 L. Ed. 1116); and can compel an insurance company to file a certificate before contracts.

(*Commonwealth* v. *Hock Age Mutual Benefit Association*, 31 Leg. Int. 245, 10 Phila. 554. See, also, *Eagle Ins. Co.* v. *Ohio*, 153 U. S. 445, 38 L. Ed. 779.)

The principle as to the State's power was affirmed in *Hutchinson Ice Cream Company* v. *State*, 242 U. S. 153, 61 L. Ed. 217.

And again in the *Queens Gas Company* case, wherein the Court refused to review the facts, or even the reasonableness of an administrative order, *N. Y. ex rel. McCall*, 245 U. S. 345, 62 L. Ed. 337.

The same principle was reaffirmed by this Court by Mr. Justice Day in the Municipal Fuel Yard Case, *Jones* v. *Portland*, 245 U. S. 217 at 221, 62 L. Ed. 252, wherein he said:

> "While the ultimate authority to determine the validity of legislation under the 14th Amendment is rested in this Court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information."

Mr. Justice McKenna rested the case of *Bunting* v. *Oregon*, 242 U. S. 426, 61 L. Ed. 830, in no small degree in the same principles.

Mr. Justice Holmes in the case of *Hebe Co.* v. *Shaw*, 248 U. S. 297, 63 L. Ed. 256, said:

> "If the character or effect of the article so intended to be used be debatable, the Legislature is entitled to its own judgment and that judgment is not to be superseded by the verdict of a jury, or, we may add, by the personal opinion of the judges, upon the issue which the Legislature has decided."

The same proposition formed the chief justification given by Mr. Justice Day in upholding the non-partisan legislation of North Dakota, wherein the Court says:

> "What was or was not a public use was a question concerning which local authorities, legislative and judicial, had special means of securing information to enable them to form a judgment; and particularly that the judgment of the highest Court of the State, declaring a given use to be public in its nature, would be accepted by this Court unless clearly unfounded." (*Green* v. *Frazier*, 253 U. S. 233 at 242, 64 L. Ed. 878.)

It, therefore, must be concluded that if presumption is to be engaged in to support the law, only clear and demonstrated usurpation of power will authorize interference with legislative action (*Green* v. *Frazier*, 253 U. S. 233, 64 L. Ed. 878). Other cases in which the Courts have deferred to the Legislature are: *Dominion Hotel Co.* v. *Ontario*, 249 U. S. 266, 62 L. Ed. 597 (Mr. Justice Holmes declared the 14th Amendment is not a pedagogical requirement of the impracticable) page 268; *U. S.* v. *Standard Brewery*, 251 U. S. 210, 64 L. Ed. 209; *State* v. *Cantwell*, 179 Mo. 245, 78 S. W. 569, affirming *Cantwell* v. *Mo.*, 199 U. S. 602, 50 L. Ed. 329; *N. Y. ex rel.* v. *Hesterberg*, 211 U. S. 31, 53 L. Ed. 75; *Parrott* v. *Benson*, 114 Wash. 116, 194 Pac. 986; *State v. Pitney*, 79 Wash. 608 at 612, 140 Pac. 918; *Securities Savings Bank* v. *California*, 263 U. S. 282, 68 L. Ed. 301.

In *O'Gorman* v. *Hartford Fire Ins. Co.*, 282 U. S. 257, 75 L. Ed. 327, the Court declared:

> "The business of insurance is so far affected with a public interest that the State may regulate the rates (*German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011, L. R. A. 1915C, 1189, 34 S. Ct. 612), and likewise the relations of those engaged in the business (*La Tourette* v. *McMaster*, 248 U. S. 465, 63 L. Ed.

362, 39 S. Ct. 160; *Stipcich* v. *Metropolitan L. Ins. Co.*, 277 U. S. 311, 320, 72 L. Ed. 895, 899, 48 S. Ct. 512). Compare *McCarter* v. *Firemen's Ins. Co.*, 74 N. J. Eq. 372, 382, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 414, 18 Ann. Cas. 1048. * * *

"The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the Court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest Court of the State indicates that such evils did exist. The record is barren of any allegation of facts tending to show unreasonableness."

(*Hartford, etc. Co.* v. *Nelson Co., supra.*)

It might well be held under the pleadings here that no question whatever as to the full faith and credit clause was presented, for the controversy turns upon the construction of a statute. *Western, etc. Indemnity Co.* v. *Rupp*, 235 U. S. 261, 59 L. Ed. 220; *Ohio* v. *Chattanooga, etc. Co.*, 289 U. S. 440, 77 L. Ed. 1308.

We find nothing *contra* in *Royal Arcanum* v. *Green*, 237 U. S. 531, 59 L. Ed. 1089, reversing 206 N. Y. 591, 100 N. E. 411, and Mississippi's opinion may be supported thereby, for the contract here to be construed makes express reference to the possibility of invalidity, and having so done, deals with property sitused in Mississippi belonging to a corporation of Mississippi and protecting it against

defalcation occurring therein by its officers, who were subject solely to Mississippi's laws.

Mississippi's statute, as construed, went no further than to protect a Mississippian as against an admitted foreign corporation in a matter whereasto Mississippi had found it essential to legislate. Mississippi's Statute, Sec. 2294, Code 1930, provided:

> "The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants."

Mississippi recognized the rule in *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. Ed. 832, and gave to it unqualified approval. *Swing* v. *Brister*, 87 Miss. (1905) 528, and in matters of insurance has consistently sought to follow this Court. *Berry* v. *Lamar Life Ins. Co.*, 165 Miss. 405, 145 So. 887, following *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, and initially held contracts of this type valid. *Southern Express Co.* v. *Hunnicutt*, 54 Miss. 566, *Universal Life Ins. Co.* v. *Whitehead*, 58 Miss. 231; *Bonner* v. *Mutual Life Ins. Co.*, 36 So. 538; but on May 9, 1904, this statute quoted was adopted, and thereof the Mississippi Court said in *Dodson* v. *Telegraph Co.*, 97 Miss. 104, 52 So. 693:

> "On the original hearing of this case we held that Code 1906, Sec. 3127, abrogated any right that the telegraph company heretofore assumed to make as one of its stipulations, that it would not be liable for damage in any case where claim therefor was not presented within sixty days after the message was filed with the company. Section 3127 prohibits changing 'in any way whatsoever' the limitation prescribed in the chapter, and further provides that 'any change in such limita-

tion made by any contract stipulation whatsoever shall be absolutely null and void.' Under a statute so broad as this, concluding with the declaration that its purpose 'is to make the period of limitation for the various causes of action the same for all litigants,' it is difficult for us to perceive how its full scope and effect could be carried out unless it is made to comprehend this very case. In the *Hunnicutt case,* 54 Miss. 566, 28 Am. Rep. 385, this Court upheld this stipulation; but there was then no statute on the subject. The vast array of authorities cited in the brief of counsel have no application, in our judgment, because the statute under discussion strikes down all such decisions. The regulation of the company says you cannot sue unless your claim be presented within sixty days. This regulation, if given effect, may in some instances, and in this very case will be a limitation in itself. If it is possible, therefore, under certain conditions, for the stipulation to become itself a limitation, how can it be soundly argued that such a stipulation does not change the limitation prescribed by the chapter 'in any way whatsoever?' If it does this, or if the stipulation superimposes conditions with which there must be a compliance or rights will be barred from suit, it is amending the statute by the telegraph company saying that, notwithstanding same, a person shall be barred unless he comply with certain conditions imposed by it, and such conditions are void under the statute. Stipulations of the character under discussion are not viewed as contracts in any true sense.

* * *

"Many States have statutes prohibiting these stipulations, and independently of statutes some Courts have held these regulations void as against public policy. The construction of this Court with reference to this statute is not unusual. In the case of *Davis* v. *Western Union, etc., Co.*, 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371, it is held that a stipulation, in a contract between a telegraph company and sender of a message, that the company will not be liable for

damages in any case if the claim is not presented in writing within sixty days after the message is filed, is void as against public policy. To the same effect is the case of *Western Union, etc., Co.* v. *Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361. In the case of *Pacific Tel. Co.* v. *Underwood*, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490, it was held that this same condition, providing that the company should not be liable for damage unless the claim was presented within sixty days, was unreasonable and without consideration, viewed as a contract, and void as an attempt on the part of the company to limit its liability for its negligence by enacting for itself a statute of limitations. The same thing is held in the case of *Western Union, etc., Co.* v. *Longwill*, 5 N. W. 308, 21 Pac. 339. In short, it was within the power of the legislature to prescribe that these stipulations should be abolished, and this we think Section 3127 has done."

Note the declaration of the Court in this very case: "The provision is a limitation of the action in this case, our statute of limitations being for six years" (citing cases).

Compare *Stuyvesant Insurance Co.* v. *Smith Motor Sales Co.*, 99 So. 575, 135 Miss. 585, wherein the contract was initially written in Tennessee, but the property having come into Mississippi was held, in a more extreme case than the present, bound by Mississippi's laws.

Compare *Standard Accident Insurance Co.* v. *Broom*, 111 Miss. 409, 71 So. 653, 654; *National Casualty Co.* v. *Mitchell*, 138 So. 808, 162 Miss. 197.

Mississippi thus by statute having made this rule a limitation as to property sitused within Mississippi, may Tennessee by contract delivered through an agency there, with the contractor domiciled in Hartford and the Land Company domiciled at Scott, subvert that within this rule of law Mississippi's legislation, at the instance of the Insurance Company, which has qualified in Mississippi, and as pro-

vided by the policy itself, for the precise contingency covered by Mississippi's laws?

Compare *Gallaher* v. *State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833, construing similar statute.

Note *Palmetto Fire Ins. Co.* v. *Cohn*, 272 U. S. 295, 71 L. Ed. 243, wherein it was held constitutional for a State to levy a tax on an insurance company while located in another State, which contracted in a third State with a sales corporation resident therein to insure its customers against loss on the articles purchased from it against fire and theft so far as the articles within the possession of the purchaser were within that State, and to exclude the insurance company from the right to do business within the State upon failure to pay their taxes. Note *Fidelity, etc., Co.* v. *Tafoya*, 270 U. S. 426, 70 L. Ed. 664. *Nutting* v. *Massachusetts*, 183 U. S. 553, 46 L. Ed. 327; *Conn. Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602, 43 L. Ed. 569; *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 44 L. Ed. 1116; *Paul* v. *Virginia*, 8 Wall. 177, 19 L. Ed. 359.

Mississippi has not as to this contract sought to do anything that has, with deference, ever been condemned by this Court.

D. *Tennessee decisions referred to not applicable herein.*

As was said in the *Rupp* case, *supra:*

> "It does not appear that the Court's attention was called to any decision by the Courts of Illinois placing a different construction, or indeed, any construction, upon the section in question. If such decision existed, it was incumbent upon defendant to prove it as a matter of fact. We are referred to no authoritative judicial construction of the statute in the state of its origin, nor have we searched for any, for what is matter of fact in the State Court is matter of fact in this Court upon review; and this applies where foreign law is in question in the State Court as well as to any other

issue of face. *Hanley* v. *Donoghue*, 116 U. S. 1, 6, 29 L. Ed. 535, 537, 6 Sup. Ct. Rep. 242; *Chicago & A. R. Co.* v. *Wiggins Ferry Co.*, 119 U. S. 615, 622, 30 L. Ed. 519, 522, 7 Sup. Ct. Rep. 398."

Appellant has not pleaded any Tennessee decision which holds that as to property sitused in Mississippi owned by a Mississippian, insured with a Connecticut corporation, as to which proof of loss must be made at Hartford, that the Tennessee Court would hold quoad that sitused in Mississippi, that the Tennessee common law would control. In short, that Mississippi quoad that in Mississippi did not have a right to dictate its own public policy.

*Guthrie* v. *Indemnity Association*, 101 Tenn. 643, pleaded as a fact, merely held, upon concession, that contractual limitations are valid and enforceable. Concessions do not make judicial precedents. *Cross* v. *Burke*, 146 U. S. 83, 36 L. Ed. 896; *Adams, State Rev. Agent* v. *Y. & M. V. R. R. Co.*, 77 Miss. 278.

That therein determined was that a saving clause from the power of the general statutes was not applicable to a contractual limitation, nor was absence from the State; in addition, this was a Tennessee contract upon a citizen of Tennessee sought to be enforced in Tennessee.

*Phoenix Cotton Oil Co.* v. *Royal Indemnity Co.*, 140 Tenn. 442, indicates contrariety in Tennessee as to the judicial holding. That there determined was as to an accident in Tennessee under a policy issued in Tennessee whereunder immediate notice was required.

*Bristol* v. *Bostwick*, 146 Tenn. 205, applied to the City of Bristol under a contract for local performance guaranteed pursuant to a State statute.

None, therefore, of these cases set up an applicability of a rule as to property in Mississippi insured by a Mississippian with a Connecticut Company, of which part per-

formance was had in Connecticut and whereasto, that in Mississippi, Mississippi had a definite public policy.

In *London Assurance Corporation* v. *Barrieos*, 167 U. S. 149, 42 L. Ed. 113, it was specifically held that the place where the contract is to be performed will govern its construction. Compare 2 *Cooley's Briefs on Insurance*, 2nd Ed., p. 1028, and Sheppard's Citation of the *Barrieos* case.

Compare the declaration in *The Kensington*, 183 U. S. 269, 46 L. Ed. 193:

> "It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught."

See 2 *Cooley's Briefs on Insurance*, 2nd Ed., 1035, where there is cited with approval *Insurance Co.* v. *Block*, 12 Ohio Cir. Ct. R. 224, declaring:

> "Where a State, to shield and protect its own citizens, passes a law which shall govern and control the making of such contracts, the law throws its protecting shield over the citizens of the State, and will determine the rights of parties if the laws of two States conflict."

Compare *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 44 L. Ed. 1116; *Cuba R. Co.* v. *Crosby*, 222 U. S. 473, 56 L. Ed. 275.

In *Finney* v. *Guy*, 189 U. S. 335, 47 L. Ed. 839, Mr. Justice Peckham said:

> "In this case the statutes, together with references to the decisions of the state Courts, are given in the complaint, and the pleader, by making an averment in the form of a fact, assumes to give a meaning to them such as he thinks to be correct; but the duty still re-

mains with the Courts to themselves determine from those statutes and decisions what is in truth the law of the foreign jurisdiction. The Courts are not concluded by an averment of what is the law in a foreign jurisdiction, contained in a pleading which is demurred to, any more than they would be by the testimony of a witness to the same effect upon a trial; certainly not when the statute upon which the case rests is set forth and the decisions under it are also referred to as evidence of the law. The demurrer does not admit as a fact that the construction (in the form of an averment of fact) which the pleader may choose to put upon those statutes or decisions is the right conclusion to be drawn from them. Notwithstanding the averments in the complaint, we are brought to an examination of the statutes and decisions referred to, in order to ourselves determine what the law of Minnesota is."

So that by the demurrer herein we did not admit aught than the facts well pleaded, and especially not that Tennessee's law extended to that in Mississippi, whereover Mississippi had asserted a definite public policy, and that these Tennessee decisions prescribe any such rule in the instant case.

In *New York Life Insurance Co.* v. *Head*, 234 U. S. 162, 58 L. Ed. 1264, this Court had the question as to whether or not the non-forfeiture provisions of Missouri statutes could be integrated into a loan executed in New York by a resident of New Mexico, as to a policy initially written in Missouri. Compare 241 Mo. 403, 147 S. W. 827. And the Court said through the Chief Justice:

"And this concession brings us to consider the second general inquiry, which is the power of the state of Missouri to extend the operation of its statutes beyond its borders into the jurisdiction of other states, so as in such other states to destroy or impair the right of persons not citizens of Missouri to contract,

> although the contract could in no sense be operative in Missouri, and although the contract was sanctioned by the law of the state where made. That is to say, the right of a state where a contract concerning a particular subject-matter not in its essence intrinsically and inherently local is once made within its borders not merely to legislate concerning acts done or agreements made within the state in the future concerning such original contract, but to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the state or original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the state where the contract was originally made. In other words, concretely speaking we must consider the validity of the loan agreement; that is, how far it was within the power of the state of Missouri to extend its authority into the state of New York, and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making such loan agreement in New York simply because it modified a contract originally made in Missouri."

The land company had its farm in Mississippi where all of its operations of this character were conducted or at least should have been conducted, for unless a farmer lives on his farm the profit forthwith disappears. The Indemnity Company had its Home Office in Hartford, Connecticut, whereto the proof was made and whereat it was examined, and that herein sought by Tennessee is, notwithstanding the provision of the contract that it should cover any employe "in any position anywhere", and that if the limitation therein as to time be void "under the law of the place governing the construction thereof," then within the shortest period of limitation permitted by law, to strike down in virtue of Tennessee's law, as the original place

where an agent made delivery (apparently and naught else), that which as to liability was fixed by Mississippi's statutes and decisions and was controlled either by Mississippi or Connecticut. It is perfectly true that this Court held in *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. Ed. 832, that Louisiana's act prohibiting the making of a contract outside of the State as to property therein deprived the party of property without due process of law. Mississippi allows the contract, but makes it conform to her public policy. Under *Hooper* v. *California*, 155 U. S. 648, 39 L. Ed. 297, there was no power by an Insurance Company or agents doing business in a State to do acts in that state under a policy in contravention of the State statutes. As stated in the Allgeyer Case:

> "The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it. * * * The contract in this case was thus made. It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state."

The cases cited by the appellant from the several states but apply this decision, as does Mississippi. *Brister* v. *Swing*, 87 Miss., *supra*.

The case of *Hooper* v. *California*, 155 U. S. 652, 39 L. Ed. 299, is more nearly in point, when it is said:

> "It is said that the right of a citizen to contract for insurance for himself is guaranteed by the 14th Amendment, and that, therefore, he cannot be deprived by the state of the capacity to so contract through an agent. The 14th Amendment, however, does not guarantee the citizen the right to make within his state, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the state. The proposition that, because a citizen might make

> such a contract for himself beyond the confines of his state, therefore he might authorize an agent to violate in his behalf the laws of his state, within her own limits, involves a clear *non sequitur*, and ignores the vital distinction between acts done within and acts done beyond a state's jurisdiction."

Compare *National Union Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71, 67 L. Ed. 136, whereunder it was held constitutional to require acceptance within 24 hours, and the Supreme Court there reaffirmed the earlier holdings. *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 277, 72 L. Ed. 279; *Hartford, etc., Co.* v. *Nelson, supra.*

There can be no doubt about Mississippi's power to control her own corporations and to this class belonged the Land Company; nor can there be any doubt about the right to admit foreign corporations, especially insurance companies, and thereover Mississippi possessed the plenary power vouchsafed. So under the reasoning thus announced in *New York Life Insurance Co.* v. *Head, supra*, we respectfully submit that as to this contract thus affecting that within Mississippi there is no invasion of constitutional right.

In *Ohio* v. *Chattanooga Boiler & Tank Co.*, 289 U. S. 440, 77 L. Ed. 1308, the Court had before it the effect of the Tennessee Compensation Act, and in the note said:

> "Had the question been merely the construction of the statute, no issue under the full faith and credit clause would have arisen. *Banholzer* v. *New York L. Ins. Co.*, 178 U. S. 402, 44 L. Ed. 1124, 20 S. Ct. 972; *Johnson* v. *New York L. Ins. Co.*, 187 U. S. 491, 495, 496, 47 L. Ed. 273-275, 23 S. Ct. 194; *Pennsylvania F. Ins. Co.* v. *Gold Issue Min. & Mill. Co.*, 243 U. S. 93, 96-97, 61 L. Ed. 610, 616, 617, 37 S. Ct. 344."

And that which we herein present is that as to those decisions so thus made, Mississippi's Court only inter-

preted that they did not extend, under the common law upon which they were based, to a contract whereasto Mississippi had made a specific statutory declaration; thereby, as to such declaration, superseding and suspending that which would otherwise have been the rule under the common law, which would, of course, preclude there being any decision herein hereon.

In *Townsend* v. *Jemison*, 9 How. 407, 13 L. Ed. 194, a cause of action arose in Mississippi more than three years before the suit was brought, which statute would have barred in Mississippi, and suit being brought in Alabama, the Court there held that Alabama's statute as to limitations controlled, and the fact that it would have been barred had it been brought in Mississippi in no wise constituted a good defense. It is to be noted that Mississippi has, as to this particular form of agreement, specifically as to local property held that the provision is one of limitation and not affecting the right to sue, and here now that at issue is, the suit being in Mississippi, is it competent for Mississippi as to the remedy thereon to be given to apply that rule as to the statute of limitation which obtained in Mississippi?

E. *Appellant's cases.*

(1) *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. Ed. 832, involved a penalty for an act whereasto defendant possessed a constitutional right. The full faith and credit clause was in no way involved, nor did this Court assume to say that Louisiana might have assumed jurisdiction over a citizen of Louisiana writing a policy of insurance to cover an interest in Louisiana with a corporation that had agreed to abide by Louisiana's laws. Naught therein contravenes that herefor contended, as appellant upon being informed of this defalcation in Mississippi may have sent its agent in Mississippi to examine the records there kept and to

ascertain the facts therefrom, and having so done to forthwith there make payment.

(2) *New York Life Insurance Co.* v. *Head*, 234 U. S. [illegible], 58 L. Ed. 1259. There Head, a citizen of New Mexico, temporarily in Kansas City, made an application for two policies to be issued in New York, which "should be considered as having been issued in New York and be treated as a New York contract". Official Edition, 154-5, L. Ed. 1262. Upon returning to Kansas City, the policies were delivered, and nine years after in New Mexico one was transferred to a daughter, who borrowed from the Insurance Company $2,270.00. The loan was requested from New Mexico, accompanied by the policy and which was pledged to secure the indebtedness. Then under the New York law, where the contract was made and was to be performed, an application of the surplus was made. The case involved the contract clause and the 14th Amendment, and the Court was at pains to say that the Missouri Court did not modify its view "By the fact that the insured was a non-resident of Missouri" and by the further fact that, on the face of the policy it was clearly manifest that it was executed not for the purpose of having effect in Missouri, but to be operative outside of that state. This Court thereupon held that Missouri might not thus forbid "the parties, one of whom was a citizen of New Mexico and the other a citizen of New York", from making such loan agreement in New York simply because it modified a contract originally made in Missouri. That is not the case at bar.

(3) *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357, 62 L. Ed. 772, is not in any wise *contra;* and the dissent of Mr. Justice Brandeis, especially Point 4 therein, page 387, Official Edition 787, is well taken:

> "Fourth: Furthermore, the right of citizens of the United States which the Allgeyer Case sustained 'is

the liberty of natural, not artificial, persons.' *Northwestern Nat. L. Ins. Co.* v. *Riggs*, 203 U. S. p. 255, 51 L. Ed. 173, 27 Sup. Ct. Rep. 126, 7 Ann. Cas. 1104. While a State may not (except in the reasonable exercise of the police power) impair the freedom of contract of a citizen of the United States, 'it can prevent the foreign insurers from sheltering themselves under his freedom.' *Nutting* v. *Massachusetts*, 183 U. S. 553, 558, 46 L. Ed. 324, 327, 22 Sup. Ct. Rep. 238; *South Carolina ex rel. Phoenix Mut. L. Ins. Co.* v. *McMaster*, 237 U. S. 63, 59 L. Ed. 839, 35 Sup. Ct. Rep. 504. The insurance company cannot be heard to object that the Missouri statute is invalid, because it deprived Dodge of rights guaranteed to natural persons, citizens of the United States. *Erie R. Co.* v. *Williams*, 233 U. S. 685, 705, 58 L. Ed. 1155, 1163, 51 L. R. A. (N. S.) 1097, 34 Sup. Ct. Rep. 761; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576, 59 L. Ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570."

*Equitable Life Assurance Society* v. *Pettus*, 140 U. S. 226, 35 L. Ed. 497; *Mutual Life Ins. Co.* v. *Hall*, 193 U. S. 551, 48 L. Ed. 788.

See, especially, *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.*, 250 U. S. 11, 63 L. Ed. 815.

(4) *Aetna Life Ins. Co.* v. *Duncan*, 266 U. S. 389, 69 L. Ed. 342.

For the distinctions thereasto we refer to our brief opposing jurisdiction. Compare, further, *Binney* v. *Nelson*, 183 U. S. 144, 46 L. Ed. 125, where it is said:

"Passing to a consideration of the stockholders' contract in the light of the other contention, it may be said that ordinarily it is controlled by the law of the State in which the incorporation is had. That is the place of contract, and, generally, the law of the place where a contract is made governs its nature, interpretation, and obligation. While this is so, it is also true that parties in making a contract may have

in view some other law than that of the place, and when that is so that other law will control. That the parties have some other law in view and contract with reference to it is shown by an express declaration to that effect. In the absence of such declaration it may be disclosed by the terms of the contract and the purpose with which it is entered into. In *Pritchard* v. *Norton*, 106 U. S. 124, 27 L. Ed. 104, 1 Sup. Ct. Rep. 104, many cases were cited by Mr. Justice Matthews, delivering the opinion of the Court, in which these propositions were illustrated and enforced, and on page 136, L. Ed. p. 108, Sup. Ct. Rep. p. 112, it was said:

"'The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall, in *Wayman* v. *Southard*, 10 Wheat. 1, 48, 6 L. ed. 253, 264, where he defined it as a principal of universal law—'the principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea had been expressed by Lord Mansfield in *Robinson* v. *Bland*, 2 Burr. 1077, 1078: 'The law of the place,' he said, 'can never be the rule where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed.' And in *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115, 120, in the Court of Exchequer Chamber, it was said that 'it is necessary to consider by what general law the parties intended that the transaction should be governed, or, rather, by what general law it is just to presume that they have submitted themselves in the matter.' *Le Breton* v. *Miles*, 8 Paige 261.'"

And further:

"Now, when they in terms specified that they were framing a corporation for the purpose of having that

corporation do business in California, is it not clear that they were contracting with reference to the laws of that State? Contracting with reference to the laws of that State they must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the State, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other States and doing business within California. How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California? Suppose these same stockholders in Colorado had formed a partnership with the expressed intent of carrying on business in California, would not that expressed intent be a clear reference to the laws of California and an incorporation of those laws into the liabilities created by the partnership business in California? And if this rule obtains as to contracts of partners between themselves, why not also as to contracts of stockholders between themselves in forming a corporation?"

There was no statute in Tennessee, but an individual in Mississippi created by Mississippi and a foreign corporation, qualified to do business in Mississippi, made a contract as to property sitused in Mississippi, and that at issue is may those two thus contracting subvert Mississippi's laws as to that sitused within Mississippi contrary to the public policy of Mississippi?

(5) *Home Ins. Co. v. Dick*, 281 U. S. 397, 74 L. Ed. 926.

In addition to the points hereinbefore made and stated in the motion in opposition to jurisdiction, we submit:

First. The policy involved in that case was issued by a Mexican Company; the contract was executed and delivered in Mexico to one Bonner, of Tampico, Mexico, and was by him assigned to Dick who resided in Mexico at the time

of the assignment. The policy covered a tug boat owned by the Mexican Company and it covered the vessel only in certain Mexican waters. The premium was paid in Mexico and the loss was payable in the City of Mexico in current Mexican funds. The contract of insurance expressly provided that it should be construed and governed under the laws of Mexico. The contract of reinsurance was effected by correspondence between the Mexican Company in Mexico and the New York Companies in New York. At the time the policy was issued, when it was assigned to him, and until after the loss Dick resided in Mexico. The loss occurred in Mexico. The Mexican Company was not authorized to do business in Texas, nor was it in Texas or doing any business in Texas. Not one single act pertaining to the issuance of the policy, its performance, or the loss sustained thereunder was done or required to be done or occurred in Texas. The contract was executed in Mexico upon property located in Mexico, was performed in Mexico, the loss occurred in Mexico, all of the parties to the contract were in Mexico at the time of the loss, and everything was done and performed with reference to the contract in Mexico, except the institution of the suit.

The suit was instituted in Texas in the nature of garnishment proceedings against the reinsurers. The Mexican Company was never in Texas, never before the Court, and no jurisdiction of that company was ever acquired by the Court.

Second. The statute sought to be invoked in the Texas courts, Article 5545 of the Texas Revised Civil Statutes, is as follows:

> "No person, firm, corporation, association, or combination of whatsoever kind shall enter into any stipulation, contract or agreement by reason whereof the time in which to sue thereon is limited to a shorter

> period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this state."

In order to avoid any misconstruction of the decision in this case (such as counsel for appellant has done) it is well to keep in mind that the construction of the statute involved was based upon its application to the particular state of facts of that case, likewise the whole decision rests upon the law announced as applied to these facts.

The first point decided by the Court was on the question of jurisdiction. In deciding that point the Court held that for that purpose it was not concerned with the question whether the provision complained of in the contract requiring the suit to be brought within one year was a condition precedent to the existence of the cause of action or making failure to sue within the year a breach of a condition subsequent which extinguishes the cause of action or whether the provision is properly described as relating to remedy or to substance.

In disposing of this point the Court construed the Texas statute and applied it to the particular facts of that case, using this language:

> "The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked. Nor does it govern only the remedies available in the Texas courts. It deals with the powers and capacities of persons and corporations. It expressly prohibits the making of certain contracts. *As construed*, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for. Therefore, the objection that, as applied to contracts *made and to be performed outside of Texas*, the statute violates the Federal Constitution, raises Federal questions of substance; and the existence of the Federal claim is not disproved by saying

"that the statute, or the one-year provision in the policy, relates to the remedy and not to the substance."

A casual reading of the statute discloses its non-similarity to the Mississippi statute. The Texas statute prohibits the making of a contract limiting the time to sue to a shorter period than two years, thus making the contract void under the law of Texas, whether it is to be performed in Texas or elsewhere. It prohibits the right of the parties to contract without reference to any statute of limitations. It attempts to control the right of the parties whether such right be in violation of any statute of limitations in Texas or not, or whether it violates or does not violate the laws of any other State where the contract is to be performed. While on the other hand the statute of Mississippi does not prohibit the parties from making any kind of a contract except a contract that attempts to change the statute of limitations of Mississippi. Note the language of Section 2294 Mississippi Code of 1930, *supra.*

Thus we have the Texas statute as applied to the facts in the Home Insurance Company case attempting to prohibit parties outside of Texas from entering into a contract, with certain provisions therein, which contract was executed, performed, and the loss sustained thereunder outside of Texas, and nothing thereunder or thereasto was done or performed in Texas. While on the other hand the Mississippi statute is limited in its provisions to contracts which attempt to change the statutory law of limitations of Mississippi as to that sitused in Mississippi and limited to that so thus there located, Mississippi's decisions herein being controlling thereasto, *Hartford etc. Co.* v. *Nelson, supra.*

The second point decided by the Court in the Home Insurance Company case was that:

"The Texas statute as here construed and applied deprives the garnishees of property without due

process of law. A state may, of course, prohibit and declare invalid the making of certain contracts within its *borders, even of contracts validly made elsewhere, if they are required to be performed within the state and their performance would violate its laws.* But, in the case at bar, *nothing in any way relating to the policy sued on,* or to the contracts of reinsurance, *was ever done* or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made. * * *." (Marks of emphasis ours.)

It will be noted that the construction of the statute was based solely upon its application to the facts of this particular case, the gist of which is that the contract was made and performed outside of Texas, and nothing whatsoever pertained thereto was done in Texas. An entirely different case from the case at bar.

Under headnote 6 of the opinion under this, the second point, the Court said:

"And, in the absence of a contractual provision, the local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred. In such cases, the rights and obligations of the parties are not varied. When, however, the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for."

The Court in using this language was dealing with a case wherein the general statute of limitations is involved, with no provision declaring that a contract which changed the statute was void. In other words, the situation is similar to the situation which existed in Mississippi at the time the decision was rendered in *Ward* v. *Fire Insurance Company*, 82 Miss. 124.

However, the Court under headnote 6 proceeded to limit the holding above and stated:

> "It is true also that a state is not bound to provide remedies and procedure to suit the wishes of individual litigants. It may prescribe the kind of remedies to be available in its courts and dictate the practice and procedure to be followed in pursuing those remedies. Contractual provisions relating to these matters, even if valid where made, are often disregarded by the court of the forum, pursuant to statute or otherwise. But the Texas statute deals neither with the kind of remedy available nor with the mode in which it is to be pursued. It purports to create rights and obligations. It may not validly affect contracts which are neither made nor are to be performed in Texas."

It will be observed that the Court recognizes the rule applicable to statutes similar to the Mississippi statute, and again points out provisions in the Texas statute that distinguishes it from the Mississippi statute. And in the concluding sentence the Court again gives utterance to the controlling facts which make inapplicable the Texas statute, to-wit:

> "It may not validly affect contracts which are neither made nor are to be performed in Texas."

The third point decided by the Court is:

> "Dick urges that article 5545 of the Texas law is a declaration of its public policy; and that a State may properly refuse to recognize foreign rights which

violate its declared policy. Doubtless, a State may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy; and, under some circumstances, it may refuse to aid in the enforcement of such rights. * * * (Citing authorities.) But the Mexican corporation never was in Texas; and neither it nor the garnishees invoked the aid of the Texas courts or the Texas laws. The Mexican corporation was not before the court. The garnishees were brought in by compulsory process. Neither has asked favors. They ask only to be let alone. *We need not consider* how far the State may go in imposing restrictions on the conduct of its own residents, *and of foreign corporations which have received permission to do business within its borders;* or how far it may go in refusing to lend the aid of its courts to the enforcement *of rights acquired outside its borders.* It may not abrogate the rights of parties beyond its borders having no relation *to anything done or to be done within them.*" (Italics ours.)

Here again the reason for the decision is that the facts to which the statute was applied, showed a case wherein no part of the contract sought to be avoided had any relation to anything done or to be done within the State of Texas. Therefore, the Court did not decide how far a State could go in refusing to recognize, or lend the aid of its courts to the enforcement of, rights acquired outside its borders.

The case at bar differs from the Home Insurance Company case. In the instant case the contract was executed in Tennessee. It was to be performed partially in Tennessee and partially in Mississippi. It was being performed wholly in Mississippi at the time the loss occurred. The parties to the contract were both in Mississippi and doing business in Mississippi. The appellant, a foreign

corporation, having been licensed to do business in Mississippi, and carrying on an insurance business in Mississippi, and the appellee, a Mississippi corporation domiciled in Mississippi, all of its property being located in Mississippi, and all of its business being conducted in Mississippi, with all of its offices and employees located in Mississippi, including the employee who defaulted, and for whose default this suit was instituted. The very property which it was sought, by the policy of insurance, to protect from the dishonest acts of officers and employees was located in Mississippi. The cause of action accrued in Mississippi, and the suit was instituted in Mississippi and both the parties to the contract of insurance were personally before the Court. Whereas, in the Home Insurance case the Mexican Company was not before the Court, was not in Texas, never had been, was not doing and never had done any business in Texas, nor was it authorized to do business in Texas, the property insured was not in Texas, the contract was not made in Texas, nor was anything actually done in Texas pertaining to the contract. The contract covered property never in Texas and expressly provided that it should be subject to the laws of Mexico. The loss under the policy occurred in Mexico. The contract of reinsurance entered into between the Mexican Company and the New York Companies was made and performed in Mexico and in New York and not in Texas. The contract of insurance expressly provided that the tug boat or vessel should only be insured while in Mexican waters. Nothing was done or required to be done concerning the contract which in any way sought the protection or invoked the aid of the Texas laws.

*F. Provision as to notice may well be construed as appertaining to the remedy and therefore subject to the law of the forum.*

In *National Surety Co.* v. *Architectural Decorating Co.*, 226 U. S. 276, 67 L. Ed. 221, an action was brought against a surety company on a bond conditioned that the contractor should pay all just claims. By Section 4539 of the Minnesota Code, then in force, it was provided:

> "No action shall be maintained on any such bond unless within ninety days after performing the last item of work or furnishing the last item of skill, tools, machinery, or material, the plaintiff shall serve upon the principal and his surety a written notice specifying the nature and amount of his claim, and the date of furnishing the last item thereof, nor unless the action is begun within one year after the cause of action accrues."

On April 22, 1909, this Section was amended by Chapter 413, General Laws of 1909, so as to require the notice of claim to be given within ninety days "after the completion of the contract and acceptance of the building by the proper authorities" instead of "within ninety days after performing the last item of work or furnishing the last item of skill, tools, machinery or materials," and further amended by requiring the action to be begun within one year "after the service of such notice," instead of within one year "after the cause of action accrues." The plaintiff did not give notice to the defendant in time to comply with Section 4539, *supra*, but did give such notice in time to comply with the amended act. The defendant contended that the amended act was unconstitutional because it was enacted after the

contract was made and would impair the obligation of the contract. The Supreme Court of the United States held:

> "In the case now before us, we agree with the Minnesota Supreme Court in the view that the requirement of a preliminary notice to the obligors as a condition precedent to an action upon the bond affects the remedy, and not the substantive agreement, of the parties. And although the statute as it stood when the bond was given (Rev. Laws 1905, Sec. 4539) must, under *Grant* v. *Berrisford*, be treated as if written into the contract, it still imposed a condition not upon the obligation, but only upon the remedy for breach of the obligation. Therefore, the subsequent statute, (Gen. Laws 1909, Chap. 413) effected merely a change in the remedy, without substantial modification of the obligation of the contract."

Compare *Gallagher* v. *State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833. And possessing the right thus to legislate as to remedies that by Mississippi thus done would not violate any of the appellant's constitutional rights.

POINT II.

**Counsel contend "there was no 'interest in Mississippi', in any proper sense, to control the validity of the contract."**

The only authority cited to support is *Matthews* v. *Employers Liability Assurance Corp.*, 111 N. Y. S. 76, which, with deference, is not cognate. Here, all of the business was being done in Mississippi, and there, only, was the employee obligated to account, and under Mississippi's laws, only, was he in default to a Mississippi corporation, and this indemnity being thus admeasured, Mississippi's laws were sovereign. We commend the opinion as admirably accurate thereasto. *Hartford, etc., Co.* v. *Nelson, supra.* Compare *New York Life Insurance Co.* v. *Craven,*

*supra*, where only a presumption that the law of the place of contract governs; *Mutual Life Insurance Co. v. Cohen*, 179 U. S. 262, 45 L. Ed. 181, where there is that here existent, that the presumption ceases.

Wherefore, we respectfully submit that the case should be affirmed.

Respectfully,

WALTER SILLERS,
W. C. ROBERTS,
OSCAR JOHNSTON,
MARCELLUS GREEN,
GARNER W. GREEN,
FORREST B. JACKSON,
*Attorneys for Appellee.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1933**

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# No. 650

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HARTFORD ACCIDENT AND INDEMNITY COMPANY ET AL.,

*Appellants,*

vs.

DELTA & PINE LAND COMPANY.

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

---

## PETITION FOR REHEARING.

---

WALTER SILLERS,
OSCAR JOHNSTON,
GARNER W. GREEN,
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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1933**

---

# No. 650

---

HARTFORD ACCIDENT AND INDEMNITY COMPANY ET AL.,

*Appellants,*

vs.

DELTA & PINE LAND COMPANY.

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

---

## PETITION OF THE APPELLEE, DELTA & PINE LAND COMPANY, FOR REHEARING.

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The undersigned, your petitioner, respectfully submits that it has been aggrieved by the opinion of your Honors rendered herein on the 9th day of April, 1934, in the respects hereinafter set forth and prays for a rehearing of said matter.

With deference we respectfully submit that this cause should be affirmed for the following reasons:

The demurrer filed to defendant's plea raises two questions:

(1) That the bond sued on in this cause is a contract of insurance on interest in Mississippi; that the breach of the contract occurred in Mississippi and the cause of action arose in this state; that the employee whose fidelity was guaranteed was in Mississippi at the time of the defalcation complained of, and both of the parties, appellant and appellee, were in Mississippi and doing business in this state at the time of the breach of the contract. The cause of action was filed in the Courts of Mississippi, therefore, the contract, insofar as this cause of action is concerned, is a Mississippi contract and should be construed according to the laws of Mississippi, and under the laws of this state the provision which requires that "any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee," is in conflict with the Mississippi law and is therefore inoperative.

(2) That the provision in the policy sued on which requires that "any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee," is not a substantive right under the contract but is an adjective right and pertains to the remedy of enforcement of the contract, and being in conflict with the Statute of Mississippi (Section 2294, Code of Mississippi 1930), is unenforceable in the Courts of this State.

In other words appellee contends that under the facts in this case as presented by the pleadings:

(1) The contract, although made in Tennessee, is, for the purpose of this suit, a Mississippi contract because it

is an insurance policy on property and/or interests in Mississippi and thereasto the Mississippi statute (Section 5131, Code of 1930) defining insurance and providing that "all contracts of insurance on property, lives or interests in this state shall be deemed to be made therein," applies, and the contract should be construed according to the laws of Mississippi and not according to the laws of Tennessee; and,

(2) The appellee further contends that even though it be held that the contract is not a Mississippi contract but is a Tennessee contract and the laws of that state shall control as to the substantive rights of the parties, yet the adjective rights—that is to say the rights pertaining to the remedy, are controlled by the laws of Mississippi; that the clause "any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee," is a limitation upon the action, is an adjective right and pertains to the remedy and being in conflict with the laws of Mississippi the same is unenforceable in the Courts of this state.

This Court in its decision herein complained of being of contrary view to that of the Mississippi Supreme Court, has reversed this cause on principles applicable to point (1) hereinabove referred to, but, with deference, did not pass on or adjudicate the principles raised in point (2) hereinabove referred to.

We respectfully submit that notwithsfanding the holding of this Court as to the principles raised in point (1) *supra*, this cause should be affirmed upon the principles applicable to point (2) *supra*, and in support of our contention, we submit:

(a) The clause, "any claim hereunder must be duly made upon the surety within fifteen (15) months after the ter-

mination of the suretyship for the defaulting employee," is a limitation upon the action, is an adjective right and pertains to the remedy.

The instrument sued on herein is a bond or contract of insurance indemnifying the appellee against loss sustained through fraud or dishonesty or wilful misapplication, among other employees, of H. H. Harris, its treasurer, during the period from January 1, 1929 to January 1, 1930. The defalcation by Harris occurred between May 9, 1929 and December 20, 1929, at a time when the insurance contract was in full force and effect. Immediately upon the defalcation liability was imposed upon the appellant to pay to the appellee the full amount of such defalcation. The substantive obligation of the contract therefore is the duty of the appellant to pay to the appellee the defalcation for which liability was already imposed and existed under the terms of the contract. The provisions requiring the giving of written notice to the surety at its home office, the filing of proof of loss under oath within three months after discovery of defalcation, and the making of claim upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and proviso that no suit, etc., shall be brought against the surety after expiration of twelve months after filing of proof of loss, etc., are provisions pertaining to the limitation upon the action, and do not pertain to liability, therefore affect the remedy and not the substantive agreement between the parties. *National Surety Company* v. *Architectural Decorating Company*, 226 U. S. page 276, 57 L. Ed. p. 221, from which we quote:

> "In the case now before us, we agree with the Minnesota supreme court in the view that the requirement of a preliminary notice to the obligors as a condition precedent to an action upon the bond effects the rem-

edy, and not the substantive agreement, of the parties. And although the statute as it stood when the bond was given (Rec. Laws 1905, Sec. 4539) must, under *Grant* v. *Berrisford,* be treated as if written into the contract, it still imposed a condition not upon the obligation, but only the remedy for breach of the obligation. Therefore, the subsequent statute (Gen. Laws 1909, Chap. 413) effected merely a change in the remedy, without substantial modification of the obligation of the contract."

*General Accident & Assurance Co.* v. *Walker,* 99 Miss. 404, 55 So. 31;
*Dodson* v. *Western Union Telegraph Co.,* 97 Miss. 104, 52 So. 693;
*Illinois Central R. R. Co.* v. *Jordan,* 108 Miss. 140, 66 So. 406;
*Standard Accident Ins. Co.* v. *Broom,* 111 Miss. 409, 71 So. 653;
*National Casualty Co.* v. *Mitchell* (Miss.), 138 So. 808;
*Western Union Telegraph Co.* v. *Eubanks,* 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711.

(b) The Clause in the policy providing: "Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee", being a provision pertaining to remedy it is governed by the *lex fori* and therefore the laws of Mississippi apply as to its validity and not the laws of Tennessee.

Page on Contracts, Sec. 3624;
12 C. J. 483;
37 C. J. 729;
14 R. C. L. 1418;
*L. & N. R. R.* v. *Pool,* 72 Miss. 487, 16 So. 753;
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*Adams Express Co.* v. *Walker*, 67 L. R. A., 412, 119 Ky. 121, 83 S. W. 106;
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*Williard v. Wood*, 164 U. S. 502, 41 L. Ed. 531;
*Great Western Tel. Co.* v. *Purdy*, 162 U. S. 329, 40 L. Ed. 936;
*Galliher* v. *State Mutual Life Ins. Co.*, 43 So. 833 (Ala.)

See also the recent Mississippi cases: *D'Antoni* v. *Teche Lines Inc.*, 143 So. 415 and *Boothe* v. *Teche Lines Co.*, 143 So. 418.

(c) The clause "any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee", being a provision pertaining to remedy and not to substantive rights under the contract, and the same being governed by the *lex fori*, is void because in conflict with the statute of Mississippi. (Sec. 2294, Code Mississippi 1930) which provides:

> "The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for various causes of action the same for all litigants,"

because it is an attempt to change the statute of limitations of Mississippi. See authorities cited *supra*.

(d) Although the contract was made in Tennessee and is a Tennessee contract, the validity of the clause "any claim

hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee," must be determined by the laws of Mississippi.

In support of this proposition we cite the following cases wherein the facts were very similar to the facts in this case, and wherein the courts held in accordance with our contention here:

*Galliher* v. *State Mutual Life Ins. Co.*, 43 So. (Ala.) 833. (In this case we call the Court's attention to the similarity between Sec. 2602 Code Alabama 1896 and Sec. 2294 Mississippi Code 1930.)

*Adams Express Co.* v. *Walker*, 119 Ky. 121, 83 S. W. 106, 67 L. R. A., 412.

*Western Union Tel. Co.* v. *Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A., 711.

*St. Louis & S. F. R. R. Co.* v. *Bryce*, 110 S. W. 529 (Texas).

*Southern Kansas R. R. Co. of Texas* v. *Burgess*, 90 S. W. 189 (Texas).

Wherefore, and for other reasons appearing in petitioner's briefs, petitioner respectfully urges that a rehearing may be granted and that the mandate of this Court may be stayed pending the disposition of this petition.

Respectfully submitted,

DELTA AND PINE LAND COMPANY
OF MISSISSIPPI,
WALTER SILLERS,
OSCAR JOHNSTON,
By GARNER W. GREEN,
*Its Attorneys.*

I, Garner W. Green of Jackson, Mississippi, an attorney regularly admitted to practice in the Supreme Court of the United States, do certify that, in my opinion, the foregoing petition for rehearing in the case of Hartford Accident & Indemnity Company versus Delta & Pine Land Company, No. 650, is well founded and is not presented for the purpose of creating a delay.

This, the 26 day of April, 1934.

GARNER W. GREEN.

(4930-C)

CORRECTED COPY

# SUPREME COURT OF THE UNITED STATES.

No. 650.—October Term, 1933.

Hartford Accident & Indemnity Company, et al., Appellants, vs. Delta & Pine Land Company. } Appeal from the Supreme Court of the State of Mississippi.

[April 9, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

This was an action instituted in a circuit court of Mississippi by Delta & Pine Land Company, a corporation of that state, with its principal place of business therein, against Hartford Accident & Indemnity Company, a corporation of Connecticut, having its principal place of business in Hartford in that state. The declaration alleges that on or about January 1, 1928, the plaintiff applied to the defendant for a fidelity bond and paid the agreed premiums therefor, and the defendant executed and delivered to the plaintiff such a bond, whereby it bound itself to pay the plaintiff, within sixty days after satisfactory proof, pecuniary loss sustained by the plaintiff through fraud or dishonesty or wilful misapplication by any employee "in any position, anywhere," from the time that the name of such employee should be placed upon a schedule attached to the bond to and including the termination of the suretyship for such employee by his dismissal, retirement from service, discovery of loss, or cancellation of the bond by the parties. It is alleged that the name of H. H. Harris, as treasurer of the plaintiff, appears upon the schedule, and that the amount of coverage for him is $25,000. Sundry defalcations by Harris between May 9, 1929, and December 20, 1929, totaling $2703.79, are set forth, all of which and the resulting loss occurred in the first judicial district of Bolivar county, Mississippi. The further material matters charged are that the defendant throughout all the times mentioned in the declaration, and ever since, was and now is duly qualified and licensed to do business in Mississippi; that the dishonest acts of Harris were discovered on or about May 20, 1931, immediate notice given to the defendant at its home office, and affirmative proof of loss under oath, with full particulars, filed with the de-

fendant at its home office within three months after the discovery. The declaration in conclusion asserts compliance by plaintiff with all the terms of the bond, and refusal of the defendant, though requested, to make payment of the sum demanded. Annexed to the declaration are copies of the bond and the supplementary schedules forming part of it.

The defendant's plea was, in substance: the plaintiff, before and at the date of the contract of suretyship, was doing business in Tennessee, with its principal office at Memphis in that state, and defendant also was then and is now doing business in Tennessee, having an agency at Memphis; plaintiff, through its office at Memphis, applied to defendant through its agency there for the bond, rider and schedules containing the name of the defaulting employee, Harris, constituting the contract of suretyship; defendant through its agency at Memphis executed and delivered the bond and schedules to plaintiff at its office in that city; the contract is a Tennessee contract and governed by the laws of Tennessee, and full faith and credit must be given to it in the courts of Mississippi in accordance with the requirements of Article IV, Section 1, Article I, Section 10, and Section 1 of the 14th Amendment of the Constitution of the United States; there was not at the time of delivery of the contract, and is not now, any statute in Tennessee prohibiting or invalidating the condition or limitation in the contract to the effect that any claim thereunder must be duly made upon the defendant as surety within fifteen months after the termination of the suretyship for the defaulting employee, and the plaintiff did not make claim upon the defendant for the loss within fifteen months after the termination of the suretyship for Harris, as the contract was cancelled and terminated December 31, 1929, and the plaintiff made no claim until June 22, 1931.

To this plea the plaintiff demurred, assigning these causes of demurrer: (1) the construction and validity of the provision of the contract relied upon in the plea is to be determined by the laws of Mississippi, and not by the laws of Tennessee; (2) the statute of limitations of the state where suit is brought is the statute which governs the time for bringing this action, and the provision in the contract requiring that any claim thereunder must be made upon the defendant within fifteen months after the termination of the suretyship of the defaulting employee is in violation of Section 2294 of the Mississippi Code of 1930, and in violation of the pub-

lic policy of Mississippi, and its courts are not required to give full faith and credit to this provision of the contract by Article IV, Section 1, Article I, Section 10, or Section 1 of the 14th Amendment of the Constitution.

The cause came on for hearing upon the pleadings, and the court sustained the demurrer. The defendant declined to plead further; whereupon judgment was entered by default in favor of the plaintiff, a jury was impaneled and assessed damages at the amount claimed, and final judgment was accordingly entered.

Upon appeal by the defendant the Supreme Court of Mississippi affirmed the judgment. Conceding that under the decisions of the Supreme Court of Tennessee the provision for notice within fifteen months of the termination of the suretyship is a valid limitation of liability and not a limitation of action, the court said the converse is true in Mississippi. Although the bond was executed and delivered and the agreement consummated in Tennessee, where the plaintiff and the defendant's agent had their respective offices, and where, in the absence of proof of a contrary intent, the contract was to be performed, the court concluded that the statutes of Mississippi made the instrument a Mississippi contract, and annulled the contractual limitation of the time for giving of notice of claim.

The Mississippi statutes relied upon were the following:

"A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction, loss or injury of something in which the assured or other party has an interest, as an indemnity therefor; and it shall be unlawful for any company to make any contract of insurance upon, or concerning any property or interest or lives in this state, or with any resident thereof; or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance unless and except as authorized under the provisions of this chapter. All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein." (Section 5131 of the Mississippi Code of 1930.)

"The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants." (Section 2294 of the Mississippi Code of 1930.)

The state Supreme Court said:

"But clearly under section 5131, Code 1930, defining insurance, this indemnity bond is a contract of insurance within the purview of that statute; and, further, it being expressly provided therein that all contracts of insurance on property, lives, or interests in this state shall be deemed to be made therein, in our judgment, makes the contract herein under review a Mississippi contract and solvable under the laws of this state. The contract here provided or stipulated that the appellee should be indemnified from loss by the defalcation of H. H. Harris in any position anywhere, and when he, the employee and the insured herein, removed to Mississippi and there defaulted, so far as the appellee is concerned its interest was insured or indemnified by the appellant in Mississippi, and, under the provision quoted from the above statute, became operative, and this state is obligated to enforce it, as a Mississippi contract, although it contained all the elements necessary to make it a Tennessee contract, but for the statute."

. . . . . .

"When the statute declares that such a contract shall be deemed to be made in this state, it means that the conflict of law between the two states is eliminated, and thereby, . . . a contract for fifteen months' notice was a limitation of the action unenforceable as such in this state."

The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (*Hooper* v. *California*, 155 U. S. 648; *Orient Insurance Company* v. *Daggs*, 172 U. S. 557, 565-6; *New York Life Insurance Company* v. *Cravens*, 178 U. S. 389, 398-9); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. *New York Life Insurance Company* v. *Head*, 234 U. S. 149; *Aetna Life Insurance Company* v. *Dunken*, 266 U. S. 389, 399. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. *Home Insurance Company* v. *Dick*, 281 U. S. 397, 407-8.

It is urged, however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local

public policy. The liability was for the payment of money only, and was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (*Home Insurance Company* v. *Dick, supra*, p. 408), it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. *Aetna Life Insurance Company* v. *Dunken, supra; Home Insurance Company* v. *Dick, supra.* Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner. Compare *Bond* v. *Hume*, 243 U. S. 15, 22. But clearly this is not such a case.

Our conclusion renders unnecessary a consideration of the claims made under the full faith and credit and contract clauses of the federal constitution.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

*So ordered.*